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THE HABEAS CORPUS REFORM ACT OF 1982

ORIGINAL

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 2216

A BILL TO REFORM HABEAS CORPUS PROCEDURES,
AND FOR OTHER PURPOSES

APRIL 1, 1982

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THE HABEAS CORPUS REFORM ACT OF 1982

THURSDAY, APRIL 1, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:05 a.m., in room 2228, Dirksen Senate Office Building, Hon. Howell T. Heflin (acting chairman of the committee) presiding.

Present: Senators Heflin, Thurmond, and Grassley.

Senator **HEFLIN**. The hearing will come to order.

Senator Strom Thurmond, the chairman of the committee, would be here and presiding, but he has duties in the Senate presiding right now. He has a statement that he would like to be entered into the record; the reporter already has it, so his statement will be entered into the record.

[The following was received for the record:]

PREPARED STATEMENT BY CHAIRMAN STROM THURMOND

Today the Committee on the Judiciary will examine proposals to place some reasonable limitations on endless and repeated litigation surrounding State and Federal criminal convictions. This hearing is a continuation of hearings that were held last November before the Subcommittee on Courts and chaired by the distinguished Senator from Alabama. Senator Heflin has been kind enough to preside over the hearing before the full Committee today and I commend him for his interest in this issue. I further wish to thank Senator Heflin for taking the time from his busy schedule to hear the testimony from our many distinguished guests who have been invited to appear before the Committee.

The primary consideration of habeas corpus reform is to recognize the dignity and independent stature of State Courts and to ensure the finality of criminal convictions. Swift and sure punishment is an essential deterrent of the criminal law, but it is a deterrent that has been weakened by the abuse of habeas corpus petitions. The Great Writ was designed as a shield to protect innocent citizens, but it has become a tool by which convicted criminals delay punishment and frustrate the judicial process. Adoption of reforms in habeas corpus procedures is a necessary and long overdue step in regaining public confidence in our criminal justice system.

This hearing will focus on S. 2216, the Administration's proposal to reform existing habeas corpus procedures which have been widely recognized as seriously deficient and in need of legislative reform. The bill contains proposals to address longstanding concerns regarding frivolous Federal habeas corpus petitions brought by both State and Federal prisoners. The underlying purpose of these proposals is to acknowledge the integrity and fairness of State criminal adjudications and to guarantee the finality of criminal convictions. The bill further seeks to establish reasonable and certain limitations on the availability of habeas corpus relief.

It is not my intention that habeas corpus reform should in any way affect legitimate petitions that are clearly meritorious and require close scrutiny. However, it is my intention that continuous assaults upon fair and valid State convictions through obviously spurious petitions be curtailed. To continue to countenance such activity by lack of legislative action undermines our Federal system of justice.

I compliment Senator Heflin for his concern respecting this matter and his graciousness in presiding over the hearing today. I also thank all of our prominent guests for taking their valuable time to share their thoughts and their expertise with the Committee on this important issue.

OPENING STATEMENT OF SENATOR HOWELL HEFLIN

Senator HEFLIN. Today, the Senate Judiciary Committee will further consider proposals to reform our Federal habeas corpus procedures. At stake is the delicate philosophical balancing of the procedural protections accorded to defendants under our Constitution against the Federal interest in maintaining the finality and integrity of the decisions of our State courts.

Involved, as well, is the practical matter of conserving our judicial resources at both the State and Federal levels for truly meritorious claims. What we are ultimately involved with here is an attempt to resolve the unanswerable question of, when has justice been done.

Last fall, the Subcommittee on Courts began this inquiry in hearings held to examine the merits of Senate bill 653, introduced by Chairman Thurmond and Senator Chiles, a measure to amend our Federal habeas corpus procedures regarding State prisoners.

The testimony presented generally recognized the concepts underlying the proposal—the need to achieve finality in our criminal justice system and to protect the integrity of the State judiciary as a coordinate branch in our Federal system.

At the same time, appropriate criticism was directed toward the lack of flexibility and discretion in several of the provisions of Senate bill 653, given the fundamental constitutional rights involved.

The need for an escape valve in the exceptional case has not gone unnoticed by certain members of the Supreme Court. In his yearend report on the judiciary, Chief Justice Warren Burger called for the limiting of Federal collateral review of State court convictions to claims of manifest miscarriages of justice. Such an approach suggests the desirability of leaving some discretion in the Federal courts in the case where a State court system does not fulfill the duties mandated by the Constitution.

By and large, however, the testimony received by the subcommittee recognized the present ability and the competency of most of our State courts to provide defendants with a full and fair adjudication which would meet constitutional standards. Given these circumstances, we might, with some confidence, consider measures to eliminate the abuse of the great writ, which we, of course, know as the habeas corpus writ.

Such actions could prevent situations such as one occurring in my own State of Alabama. We now have pending before the U.S. Supreme Court a case finally resolved in the State court system which has been dragged out for more than 5 years through Federal habeas corpus maneuvering.

It involves a defendant who went on a four-State rampage of violent crime, robbery and murder, and a defendant who admitted his guilt, who pled guilty at the time of the trial, who was convicted of a capital offense by a jury in April of 1977, and who was sentenced to death after a hearing where judicial findings were entered, as required by State law; that the aggravating circumstances outweighed the mitigating circumstances.

This conviction and sentence was affirmed by the Alabama Court of Criminal Appeals, and later by the Alabama Supreme Court. The U.S. Supreme Court denied a petition for writ of certiorari in March of 1979, and a date for execution was set.

Two years and four occasions for review had transpired. At this point, the Federal habeas corpus process goes into gear and the State court system's conviction was ultimately reversed by the fifth circuit. For more than 5 years since indictment, the U.S. Supreme Court has recently granted a petition for certiorari, and oral argument was held last week.

I realize that the review of a capital offense conviction must involve a careful scrutiny based on the principles of procedural due process, fundamental fairness, equal protection, and other specific constitutional safeguards. State judges, no less than Federal judges, must uphold these principles as their obligation under article VI of the Constitution.

Against this background, we will today consider the merits of the alternate proposal of the Department of Justice regarding habeas corpus reform, Senate bill 2216. Through this endeavor, we hope to achieve a constitutional and workable solution toward restoring public confidence in our criminal justice system, realizing finality of court decisions.

We are pleased at this time to have Senator Lawton Chiles testify. Senator Chiles has been interested in improving the criminal laws of his State and waging a war against crime throughout the United States, and has introduced many bills and has been a leader in endeavoring to come up with a crime package to meet the problem which most of us consider, next to our economy, as being the major domestic problem in this country.

Senator Chiles, we welcome you to this hearing and we would be delighted to hear from you.

STATEMENT OF HON. LAWTON CHILES, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator CHILES. Thank you, Mr. Chairman. I want to congratulate you on holding this hearing, commend you on your continuing efforts in trying to push forward with reforms in our habeas corpus laws, and also for your efforts and work in trying to come up with a package of bills that could help us in our war against crime.

Last month, I was delighted to see that the Attorney General of the United States, William French Smith, came out in strong support of efforts to reform our habeas corpus laws. His voice is added to the voices of those here in the Congress, in the academic community, in our State and local governments, and in our courts. These voices are calling for the need to give greater respect to fair judgments recorded in State courts, and to establish a greater sense of finality in our criminal justice system. The concerns these voices are raising are well taken.

The past 25 years have brought about an explosion in the use of the habeas corpus writ by State prisoners to attack their State court convictions. The writ itself was first made available to State prisoners by a statute enacted by Congress in 1867.

In 1953, in the *Brown* v. *Allen* case, the Supreme Court interpreted the 1867 habeas corpus statute in such a way as to give the Federal district courts broad authority to redetermine the merits of State court convictions. At that time, Justice Jackson expressed deep concern over the "floods of stale, frivolous and repetitious petitions which will swamp the dockets of the lower courts and swell our own." Mr. Justice Jackson's observations have proven all too accurate, as prisoners have taken advantage of the easy availability of access to the Federal courts.

In 1953, that flood consisted of 541 petitions. Last year, there were 7,031 such petitions filed by State prisoners in Federal courts. That represents a thirteenfold increase in the number of petitions filed since 1953. In fact, the total number of State prisoner petitions, which includes other forms of challenges to the conviction, now account for over 11 percent of the total number of all civil cases filed in Federal courts today.

As the Justice Department pointed out, the result is that in our current criminal justice system, the availability of Federal habeas corpus is a routine means for the review of State court convictions. That is quite different from using Federal habeas corpus reviews as a fail safe mechanism, which would be used in cases where a person simply did not get a fair trial in State court.

It is this latter purpose—using Federal habeas corpus as a way to assure that a person accused of a crime gets a fair trial—that is what the writ of habeas corpus was designed to carry out.

S. 653, a bill which the chairman of this committee and I introduced last year, is designed to restore the writ of habeas corpus to its original role. I believe that S. 2216, the Justice Department's bill, is designed to do precisely the same thing. S. 2216 has my support. I hope that the committee will see fit to take up both bills and report a bill to the full Senate.

I would like to make a few observations about S. 2216, the Justice Department's bill, for the committee's consideration. As I mentioned earlier, both S. 653 and the Justice Department's bill are aimed at solving the same problem, so the focus must be on the methods that each bill establishes to solve the problems in today's system.

The first section of S. 653 would redefine the role of U.S. magistrates in conducting evidentiary hearings in habeas cases brought by State prisoners. It would specify that magistrates could not conduct such hearings without the consent of parties to the proceeding. Today, we allow magistrates to make recommended findings of fact which can, in effect, overrule the decisions rendered by State trial judges and approved by State supreme courts.

S. 2216, on the other hand, does not address the issue of what role a Federal magistrate should play in a habeas corpus proceeding. I understand the concern over increasing the workload of Federal judges if magistrates are not allowed to conduct evidentiary proceedings in habeas cases.

Nevertheless, we ought to give weight to the need to have such important factual determinations conducted by article 3 judges. One possible way to balance these concerns might be to specify that in any capital cases, only Federal court judges could conduct evidentiary proceedings. I believe that this is the system now used by the U.S. Federal Court for the Middle District of Florida.

Both S. 653 and S. 2216 contain provisions which try to establish, in statutory form, the notion that Federal courts ought to give deference to orderly State court proceedings. The idea was first expressed by the Supreme Court in the *Wainwright* v. *Sykes* case.

Wainwright stated that a person who failed to comply with State court procedures could not then turn around and raise claims for the first time in a Federal habeas corpus proceeding unless he could show a valid cause for his failure to follow State procedures. Both S. 653 and S. 2216 list specific instances which are "causes" for not complying with State court procedures. Both assure greater respect for fair State court procedures.

A major problem in today's system is the number of stale habeas corpus claims filed. Both S. 653 and S. 2216 try to make sure that habeas claims are filed and considered while the evidence is still fresh. Each bill sets up a statute of limitations for filing habeas petitions. Both statutes of limitations are triggered once the defendant has exhausted his State appeals. S. 653 has a 3-year statute of limitations, and S. 2216 has a 1-year limit. I would favor either approach, since they both assure that habeas claims must be filed promptly.

One major difference between S. 653 and S. 2216 is the approach each bill takes to another problem—the redetermination of a State court's factual findings in a habeas proceeding. To understand the contrast, we have to look first at today's system.

Current law creates a presumption that the State court's factual findings are correct. That presumption falls if the habeas petitioner is able to establish that one of eight specified defects existed in the State proceedings. But a failure to establish one of these defects is not a bar to holding another factual hearing; it simply gives the petitioner the burden of proof in the hearing.

The result is that such hearings can be, and, in fact, are held almost at the discretion of the court, regardless of the sufficiency or fairness of the State proceeding. I am not of a mind that this is the way our courts should operate.

S. 653 changes current law in two ways. First, it tightens up the conditions which trigger new hearings, to assure that needless factual redeterminations are limited. Second, it specifies that a person must satisfy one of these preconditions in order to get a Federal hearing. It takes away the discretion to hold hearings even if a person is unable to meet the preconditions.

S. 2216 takes a different approach. It does not require a habeas corpus petitioner to meet any preconditions in order to get a factual hearing. It simply gives the habeas corpus petitioner a higher burden of proof—clear and convincing evidence is needed to overcome the presumption that the State court's factual decisions were correct.

S. 2216 does not act to bar that hearing. Moreover, it eliminates all of the specific preconditions which are a part of S. 653 and part of the current law. As a result, S. 2216 seems to give a Federal judge much more discretion to decide whether or not to hold a hearing on a factual issue decided in the State court, even though the habeas petitioner has a high burden of proof.

I am not sure it is appropriate to give this much leeway to the courts, and I am not sure that S. 2216 will eliminate unnecessary factual hearings. I hope the committee will give some thought to setting up specific preconditions for getting a habeas hearing. In any case, however, raising the burden of proof is a positive step and would help give more finality to the factual decisions reached in our State courts.

S. 2216 contains several provisions which are not a part of S. 653, and I would like to speak out in favor of these provisions. First, it specifies that a Federal habeas court does not have to redetermine legal claims which were fully and fairly decided in the State court. That requirement reflects the notion that our State courts have the competence and integrity to make sure that Federal constitutional rights are protected in the State courts. I favor this approach, since it helps to give weight to the need for finality in criminal cases and because it strikes a good balance between the Federal courts and our State courts.

S. 2216 also contains provisions that extend all of the proposals for State habeas corpus proceedings to the Federal habeas corpus proceedings, or so-called section 2255 cases. I support this provision of S. 2216, and would hope that any habeas corpus reform bill reaches to both Federal and State cases.

Mr. Chairman, these proposals may not be the only way to address the current situation. I do think, however, we need to look for ways to improve today's system and we need to move quickly. We need more finality in our criminal court system, we need to avoid pointless relitigation of stale cases, and we need greater respect for our State court systems. That is essential to maintaining public confidence in our system of justice.

I am not sure that we have that today. In the words of one Supreme Court Justice, all too often, the State trial is more like a tryout on the road and you do not get to Broadway until you start filing appeals in the Federal courts.

All too often, we read about someone who is being released as a result of an appeal filed years or even decades after his original trial. All too often, these appeals are purely technical. They do not go to what should be the two fundamental issues in these cases. First, was the person filing the appeal innocent? Second, did the person get a fair trail?

I believe that our State courts are capable of giving fair trials. I believe that if a person does not get a fair trail in the State courts, he should be entitled to one in the Federal courts, but I also believe that our criminal justice system cannot serve society if it allows any case to be reopened at any time and on practically any grounds.

These beliefs can be balanced. In today's system, however, I do not believe that they are balanced, Both S. 653 and S. 2216 are attempts to strike a more equitable balance. I only hope that we can move quickly on these proposals. Thank you, sir.

Senator **Heflin**. Well, thank you, Senator Chiles. You point out a great many matters that I think we ought to give serious consideration to and come up with some sort of solution to this problem.

There is a threshold question of whether a fair and full adjudicatory hearing was held in the State courts. If that were to be a threshold determination that had to be made before habeas corpus was entered into by the Federal court, will it be subject to a lot of interpretations as to fair and full hearings?

What I have in mind is, would this cause a consideration or an evaluation of the court proceeding in each of the State courts? Is it a standard that can be judicially reviewed by a higher court, we will say, on an appeal?

Senator CHILES. I think it would be very difficult, Mr. Chairman. Without some further guidelines, perhaps along the lines of the specific instances in S. 653, I think that you are going to find that many Federal judges may stay involved. They are going to say, "The only way we can really determine that is to open it up; we will have to go into evidence. We will have to almost, in effect, go through the whole trail process again." Then, I think that we would be back into the situation which we were in before.

We have got to have some way or some burden of showing that the State trial was not fair. Now, I very much feel that if, for some reason, a State court denies a petitioner his right to a fair trial, certainly we want to address that situation. That is what the writ was about to start with.

But it seems to me that there has got to be some clear and convincing showing that the State trial was unfair. And if we get some broad standard in a new law, then I do not think that we have sent any signal to the Federal judges that we have changed anything.

Right now, I talk to Federal judges all the time. They say, "We get these writs. We must hold these hearings; we must go into this process. We are required to do that." It is taking up their time. They recognize the problems that are connected with it. They recognize the delays, but they say that the way the law now reads, they are forced to do that.

So, I think that you have got to send some clear signal that we are really changing that, and that we are going to give greater weight to the decisions of our State courts.

Senator HEFLIN. Well, one of the criticisms of the present system is that it is referred to a magistrate, and a magistrate, in effect, reverses a State supreme court.

Senator CHILES. Yes, sir.

Senator HEFLIN. If you had this standard of a fair and full adjudication, do you have any feelings as to whether or not there ought to be any prohibition against magistrates making that determination?

Senator CHILES. Well, in the bill that I have introduced with Senator Thurmond, S. 653 we prevented that from taking place. S. 2216 does not speak to that, and I think the reason, as I understand it, is that they are worried that you are going to put too much of a burden on Federal judges, who already have too many cases.

I just mentioned in my testimony that in the Middle District of Florida, they have struck a kind of a compromise in which they say in all capital cases, it must be a Federal district judge who holds the hearing. It may be that you can strike some balance there.

I am of a mind to say that magistrates should not be doing that. I think to have a magistrate effectively overrule a State supreme court—the lowest officer of the Federal system overruling the State supreme court—is just not good policy.

Senator HEFLIN. Thank you, Senator Chiles; we appreciate your being here.

Senator CHILES. I thank you.

Senator HEFLIN. Our next witness is the Honorable Jonathan Rose, the Assistant Attorney General, Office of Legal Policy, of the Department of Justice of the United States.

Mr. Rose, we are delighted to have you with us.

Before you begin, I wish to place the text of S. 2216 into the record.

[The bill follows:]

II

97TH CONGRESS
2D SESSION

S. 2216

To reform habeas corpus procedures, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 16 (legislative day, FEBRUARY 22), 1982

Mr. THURMOND (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To reform habeas corpus procedures, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Habeas Corpus Reform Act of 1982".

Sec. 2. Section 2244 of title 28, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) When a person in custody pursuant to the judgment of a State court fails to raise a claim in State proceedings at the time or in the manner required by State rules of procedure, the claim shall not be entertained in an application for a writ of habeas corpus unless actual prejudice resulted to the applicant from the alleged denial of the Federal right asserted and—

"(1) the failure to raise the claim properly or to have it heard in State proceedings was the result of State action in violation of the Constitution or laws of the United States;

"(2) the Federal right asserted was not recognized prior to the procedural default; or

"(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

"(e) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of the following times:

"(1) the time at which State remedies are exhausted;

"(2) the time at which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such State action;

"(3) the time at which the Federal right asserted was initially recognized; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

SEC. 3. Section 2253 of title 28, United States Code, is amended to read as follows:

"§ 2253. Appeal

"In a habeas corpus proceeding or a proceeding under section 2255 of this title before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"An appeal may not be taken to the court of appeals from the final order to a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, or from the final order in a proceeding under section 2255 of this title, unless a circuit justice or judge issues a certificate of probable cause.".

SEC. 4. Federal Rule of Appellate Procedure 22 is amended to read as follows:

"Rule 22. Habeas Corpus and Section 2255 Proceedings

"(a) APPLICATION FOR AN ORIGINAL WRIT OF HABEAS CORPUS.—An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

"(b) NECESSITY OF CERTIFICATE OF PROBABLE CAUSE FOR APPEAL.—In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, and in a motion proceeding pursuant to section 2255 of title 28, United States Code, an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause. If a request for a certificate of probable cause is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or the government or its representative, a certificate of probable cause is not required.".

SEC. 5. Section 2254 of title 28, United States Code, is amended by redesignating subsections "(e)" and "(f)" as subsections "(f)" and "(g)" respectively, and is further amended—

(a) by amending subsection (b) to read as follows:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the applicant. An application may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.";

(b) by adding a new subsection (d) reading as follows:

"(d) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings."; and

(c) by redesignating subsection "(d)" as subsection "(e)," and amending it to read as follows:

"(e) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a full and fair determination of a factual issue made in the case by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting this presumption by clear and convincing evidence."

SEC. 6. Section 2255 of title 28, United States Code, is amended by deleting the second paragraph and the penultimate paragraph thereof, and by adding at the end thereof the following new paragraphs:

"When a person fails to raise a claim at the time or in the manner required by Federal rules of procedure, the claim shall not be entertained in a motion under this section unless actual prejudice resulted to the movant from the alleged denial of the right asserted and—

"(1) the failure to raise the claim properly, or to have it heard, was the result of governmental action in violation of the Constitution or laws of the United States;

"(2) the right asserted as not recognized prior to the procedural default; or

"(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

"A two year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of the following times:

"(1) the time at which the judgment of conviction becomes final;

"(2) the time at which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, where the movant was prevented from making a motion by such governmental action;

"(3) the time at which the right asserted was initially recognized; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence."

○

STATEMENT OF HON. JONATHAN C. ROSE, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE

Mr. ROSE. Good morning, Mr. Chairman.

Mr. Chairman, I am delighted to be here this morning to join Senator Chiles and Attorney General White in participating in these hearings on S. 2216. This bill incorporates the administration's proposed reforms in habeas corpus procedures.

The historical purpose of the writ of habeas corpus, familiar to the framers of the Constitution, was to ensure the availability of a means for securing judicial review of the legality of a person's detention. It has, however, as Senator Chiles just recited, more recently developed into a means for duplicative readjudication by the lower Federal courts of matters affecting the lawfulness of a person's detention which have already been adequately considered and decided by the courts of the States. Our proposals would eliminate the excessive features of the current habeas corpus jurisdiction without affecting the historical purpose and function of the Great Writ.

In formulating our proposals, we have benefited greatly from bill S. 653, the similar recommendations of the Attorney General's Task Force on Violent Crime, and the comments and the assessments that these have evoked.

We have sought in our bill to improve the implementation of the remedies for a number of serious deficiencies in the present system that were identified in those earlier proposals. We have also sought to correct a number of additional deficiencies that have not been previously addressed in recent legislative proposals relating to habeas corpus.

The remainder of my testimony will be organized as comments on the particular proposals contained in S. 2216.

One, proposed amendments relating to readjudication of matters previously adjudicated in State proceedings. Our bill would amend 28 U.S.C. 2254 so as to require deference to the result of a full and fair adjudication of a claim in State proceedings.

In order to be full and fair in the intended sense, the State adjudication must reflect a reasonable determination of the facts based on the evidence presented to State courts, a reasonable view of Federal law, and a reasonable application of the law to the facts. It must also be conducted in a manner consistent with the procedural requirements of Federal law, including the requirement of due process.

Appropriate allowances would be made for readjudication in cases of subsequent discovery of new evidence and subsequent retroactive changes in Federal law which are of a substantial importance to the disposition of the claim.

The propriety of such a rule requires little explanation. Unlike direct review in the Supreme Court, redetermination in the lower Federal courts in habeas corpus proceedings of issues that have already been decided in State proceedings does not produce uniformity in the interpretation of Federal law. The lower Federal courts themselves are often divided on such questions, and their decisions in habeas corpus proceedings have no binding effect on the State courts outside of the particular case.

In relation to the more limited purpose of assuring that Federal rights are respected and that justice is done in particular cases, the current rules governing redetermination of issues in habeas corpus proceedings are clearly excessive.

If a defendant's contentions have been fairly heard and decided once, it is gratuitous to require that they be independently determined again. Yet, the current rules require that a Federal habeas corpus court redetermine all questions of law raised by a petitioner's claims, and to reapply the law to the facts.

This is mandated uniformly, though the same claims have been raised and rejected in State proceedings, often repeatedly and by the highest court of the State. It is manifestly reasonable to require a showing that the State process was inadequate before a defendant is accorded yet another level of review in the Federal courts.

In comparison with S. 653 and the recommendations of the Violent Crime Task Force, this proposal, in our judgment, reflects a more complete resolution of the problem of deference to prior State adjudications. Where S. 653 states limiting rules applicable to the redetermination of questions of fact, the rule proposed in S. 2216 would apply to a claim raised by the petitioner as a whole, including as well its legal aspects and the application of the law to the facts.

Two, imposing a time limitation on access to the writ of Federal habeas corpus. The second major reform effected by S. 2216 would be to create a 1-year limitation period for the filing of petitions for Federal habeas corpus by adding a new subsection to 28 U.S.C. 2244.

The limitation period would normally run from the time State remedies are exhausted. Appropriate allowances would be made for cases of late discovery of the factual basis for a claim, recognition of new retroactive rights by the Supreme Court, and certain other exceptional circumstances.

As a practical matter, a petitioner who has properly exhausted State remedies will generally have raised his claims previously in State court either on direct review or in State collateral proceedings. If a prisoner has previously presented his claims in State proceedings, it is reasonable to require him to delay for no more than 1 year before representing the same claims on application for Federal habeas corpus.

It is within the power of the Congress to enact such limitations. As the Supreme Court stated in Yakus against the United States:

> No procedural principle is more familiar to this court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

In general, time limits are common in criminal law. For example, under Federal Rule of Criminal Procedure 33, a Federal prisoner cannot obtain a new trial on grounds of newly discovered evidence more than 2 years after final judgment.

We believe that such a limitation period is necessary in light of the compelling policies supporting the establishment at some point of a definite end to litigation. As Justice Harlan stated in Mackey against the United States, and I quote:

> Both the individual criminal defendant and society have an interest in insuring that there will be at some point the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error, but rather on whether the prisoner can be restored to a useful place in the community.
>
> No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

Similarly, Chief Justice Burger, in criticizing the present broad availability of Federal habeas corpus for State prisoners, has stated, quote, "The administration of justice in this country is plagued and bogged down with lack of reasonable finality of judgments in criminal cases."

In comparison with S. 653 and the recommendations of the Attorney General's Violent Crime Task Force, S. 2216 would create a 1-year limitation period, normally running from exhaustion of State remedies, rather than a 3-year period running from the time the judgment becomes final; that is, the end of the appellate process.

In practical terms, the limitation rule of S. 2216 is neither generally more permissive nor generally more restrictive than that of S. 653. Although the period is shorter, its starting point—exhaustion of State remedies—often does not occur for a considerable time after finality, since properly exhausting State remedies may require pursuit of State collateral remedies following the conclusion of the State appellate process.

Since exhaustion of State remedies is the initial point at which Federal habeas corpus may be properly sought, a 1-year limitation period starting from exhaustion evenhandedly assures every State prisoner of a reasonable opportunity to apply for Federal habeas corpus after the conclusion of the State criminal process.

Three, codifying and extending the rule of Wainwright and Sykes. In both the State and Federal systems, many procedural rules exist which result in the forfeiture of claims for purposes of all subsequent proceedings if they are not raised at a certain time or in a certain manner.

In a typical State, such rules may include, for example, requirements that challenges to grand jury composition or to the seizure of evidence be made before trial; provisions that most other claims cannot be raised initially on appeal or collateral attack, where they were not raised at trial; and provisions that claims which should have been raised on appeal but were not are forfeited for the purposes of subsequent collateral proceedings.

A defendant's failure to comply with such a rule is referred to as a procedural default. The effect of a procedural default in State proceedings on the subsequent availability of Federal collateral relief has been a perennial problem in Federal habeas corpus procedure.

The most recent general pronouncement of the Supreme Court on this question was the case of *Wainwright* v. *Sykes* in 1977. In that case, the court held that a showing of "cause and prejudice" would be required from the petitioner as a prerequisite to excusing some types of procedural defaults.

The interpretation and application of the "cause" component of this standard has been a source of great uncertainty and division in lower Federal courts. S. 2216 would resolve these uncertainties by codifying the cause and prejudice requirement as a new subsection of title 28, United States Code, section 2244, and providing a precise definition of the notion of "cause." It would also clarify that the "cause and prejudice" standard is the exclusive test governing the availability of Federal habeas corpus review for a claim not properly raised in State proceedings.

This would resolve uncertainties concerning the scope of application of that standard and uncertainties concerning the relationship of the rules governing access to Federal collateral remedies to those governing the availability of direct review in the Supreme Court following a procedural default.

In formulating our definition, we have set up as the central inquiry whether the State provided the defendant with an opportunity to raise his claim that satisfied the requirements of Federal law. If the State has not provided such an opportunity, no grounds for complaint exist if the deficiency is made up by consideration of the claim by a Federal habeas corpus court.

Conversely, if the State, in its criminal proceedings, has provided an opportunity consistent with the standards provided by Federal law to assert a claimed violation of a Federal right, and that opportunity was not taken, it is not apparent why an opportunity should be provided to upset the State judgment at a much later date by allowing the claim to be heard in a Federal collateral proceeding.

The specific formulation proposed is that a procedural default will be excused if it was the result of State action in violation of Federal law. Hence, for example, attorney error or misjudgment amounting to the denial of constitutionally effective assistance of counsel would qualify as "cause" for a failure to raise a claim properly in State proceedings. But lesser degrees of attorney error or misjudgment would not qualify as cause. Appropriate allowances for a finding of cause would also be made in case of late discovery of the factual basis of a claim or subsequent recognition by the Supreme Court of a new retroactive right which forms the legal basis for a claim.

In comparison with S. 653 and the recommendations of the Attorney General's Task Force on Violent Crime, the definition of "cause" appears similar in substance. S. 2216's definition is more precise and avoids the possibility of misunderstandings concerning the adequacy of attorney incompetence and other violations of Federal law by the State or its agents as grounds for cause.

Four, technical amendments relating to the requirement of exhaustion of State remedies and appeal. S. 2216 addresses certain more technical aspects of habeas corpus procedures which were not addressed in the earlier proposals. These provisions are of importance from the perspective of judicial economy.

First, S. 2216 would amend title 28, United States Code, section 2254(b) to make it clear that a petition may be denied on the merits, notwithstanding the failure of the petitioner to exhaust State remedies. This would avoid the waste of time and effort that presently occurs when a frivolous petition is dismissed for nonexhaustion of State remedies and is later brought back to Federal court after having been presented to and rejected by the State courts at the trial and appellate levels. Empirical studies of Federal habeas corpus indicate that such a reform would ameliorate a major source of inefficiency in the current system.

Second, S. 2216 would vest authority to issue certificates of probable cause for appeal exclusively in the judges of the Federal courts of appeals by amending title 28, United States Code, section 2253 and Federal appellate rule 22. This would eliminate the current anomalous procedure in which a petitioner is afforded duplicative opportunities to persuade a district judge and then a circuit judge that an appeal is warranted, and in which the judges of the appellate court are obliged to hear an appeal for which a district court has issued a certificate of probable cause.

As Judge Friendly of the second circuit court of appeals has stated,

> In view of the staggering growth in the case loads of the courts of appeals * * * Congress should move promptly to amend 28 U.S.C. 2253 * * * so as to place the authority to issue certificates of probable cause solely in the courts of appeals and require similar authorization for appeals by federal prisoners in cases under 28 U.S.C. 2255.

S. 2216 would carry out these proposed reforms.

Five, proposed amendments relating to collateral relief for Federal prisoners. S. 2216 goes beyond earlier proposals in addressing the availability of collateral relief for Federal prisoners as well as State prisoners. The counterpart of habeas corpus for Federal prisoners is the statutory collateral remedy of title 28, United States Code, section 2255. S. 2216 would institute three reforms in this remedy.

First, it would create a certificate requirement as a prerequisite to appeal in section 2255 proceedings. Like habeas corpus petitions by State prisoners, motions pursuant to section 2255 often raise no genuine issues. A showing of probable cause is accordingly an equally appropriate threshold for a Federal prisoner to meet before his appeal in a collateral proceeding will be heard by a full appellate panel.

Second, it would amend title 28, United States Code, section 2255 to codify the requirement of "cause and prejudice" applicable to requests for collateral relief by Federal prisoners who have committed procedural defaults at earlier stages in Federal criminal proceedings. The definition of "cause and prejudice" would be the same as that applicable to habeas corpus petitions by State prisoners.

Third, it would amend 2255 to create a 2-year limitation period for motions under that section. The period would normally run from the time the judgment becomes final; that is, the end of the appellate process. It is a curious feature of the current system that a Federal prisoner who discovers proof of his innocence more than 2 years after final judgment has no judicial remedy but must seek executive clemency, while a Federal prisoner who asserts violations of constitutional rights which may cast no real doubt upon his guilt is afforded a judicial remedy without limitation of time.

The proposed limitation period would reduce this discrepancy, bring the procedure under 2255 into line with the proposed limitation period for State prisoners' applications for habeas corpus, and accord appropriate weight to the interest in finality and repose in criminal adjudication.

CONCLUSION

In sum, S. 2216 incorporates a rounded set of proposals which address both the major shortcomings in the current system of Federal collateral relief from the perspective of federalism and criminal law policy, and also the mundane aspects of procedure which are nevertheless very important from the perspective of judicial economy.

I believe that this bill will produce a system that affords a more appropriate recognition to the dignity and independent stature of State courts, better serves the needs and objectives of criminal justice, and creates a lesser burden for both the States and the Federal Government. It will do so, moreover, without sacrificing fairness to criminal defendants or jeopardizing the protection of procedural rights.

I might conclude, Mr. Chairman, with a quote from Judge Hand, where he says, in 1923:

> Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of an innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism that obstructs, delays, and defeats the prosecution of crime.

That concludes my prepared statement, sir.

Senator **Heflin**. Thank you, Mr. Rose.

Let me ask you about your statute of limitations. I notice that S. 2216 would create a 1-year statute of limitations period, running from the exhaustion, normally, of State remedies rather than running from when the time the judgment becomes final.

Now, S. 653 has 3 years, and that is a much longer period, we obviously can see. But is there a problem about it running from the exhaustion of State remedies?

We will say it has gone through the appellate process in a State and the State supreme court, and the judgment has been affirmed, and they take the writ of certiorari to the Supreme Court. The Supreme Court might take 9 months in determining whether to grant the cert or not.

From a practical matter, should the statute of limitations run from the exhaustion of State remedies or from the process of the petition for writ of certiorari to the State courts?

Mr. **Rose**. Well, Mr. Chairman, this is a difficult problem because the question of exhaustion of State remedies is obviously the talismatic phrase there as opposed to the final adjudication or final judgment, which is used in S. 653.

The reason we chose exhaustion of State remedies was for the purpose of dealing with the availability of State collateral relief after final judgment. S. 653 basically would impose a 3-year limitation after the judgment itself becomes final and, presumably, the writ of certiorari to the Supreme Court is denied.

Then, presumably, if you were going to have the availability of State collateral relief following that, in a State where that process was efficient they would presumably finish the whole thing up within 3 years, and presumably more of that State's convictions would be subject to Federal habeas corpus because part of the Federal habeas corpus process is that they have, in fact, exhausted their State remedies before they get to the Federal court.

If a State was inefficient and had a slow process of dealing with claims for collateral relief, then presumably they would have very few of their cases subject to the Federal habeas corpus review.

It was in an attempt to deal with that particular anomaly that we chose this 1-year period after the exhaustion of State collateral remedies. I think, in practical effect, there probably is not going to be a whole lot of difference, but that was the reason why we took that tack.

Senator HEFLIN. You state in your testimony that attorney error or misjudgment amounting to a denial of constitutionally effective assistance of counsel would qualify as cause under proposed subsection (d)(1).

Would you explain how attorney error qualifies as State action to excuse a procedural default under this section?

Mr. ROSE. Well, I had that same question, and it is our understanding that recent Supreme Court cases so provide. I will be glad to provide the committee with the cases where, under the color of law, it does import constitutional ineffectiveness of State-appointed counsel; that that does constitute State action.

We believe that that has been so held by the Supreme Court, and I would be glad to give you the case; I do not have it on the tip of my tongue.

Senator HEFLIN. During the hearing held in November on S. 653, the witnesses representing individual States commented favorably on the proposal in that bill that required a district judge rather than a magistrate to hear those cases in which evidentiary hearings were necessary.

The administration's bill does not contain a comparable proposal. Do you feel that a magistrate has the requisite experience and authority to determine the validity of the decisions of the State supreme court, and is this a policy problem that causes somewhat of a feeling on the State judge's part that one person who is not an article 3 judge is basically reversing his decision and that it is bad policy to do it?

What is your feeling pertaining to the matter of magistrates, and will you explain your rationale behind your proposal?

Mr. ROSE. Certainly, Mr. Chairman. I think if you look at title 28, section 636, which deals with the powers of the magistrates and what they can do, it is apparent there that a full appeal to the district court does lie from the findings of the magistrate, so that there is no dispositive power that he has other than to make an initial record and to conduct evidenciary hearings.

This is not a subject, frankly, on which I feel deeply. I have gathered from our research into the matter that this has become a particular problem in the State of Florida, where there has been, apparently, an abnormally high number of hearings conducted by magistrates. That was one of the reasons for Attorney General Smith's concern on this particular subject.

Nationwide, we do not find this a particularly serious problem. Indeed, the flexibility that is provided under the current statutory scheme appears to us to be perfectly appropriate. I have gathered, as I say, that this problem of having the findings of State judges reviewed by magistrates really may be a problem peculiar to the State of Florida and I do not really know the reason for that.

Senator HEFLIN. Looking at the overall issue, basically, the arguments are that if there is a full and fair adjudication of Federal issues as well as State issues by the State court, that ought to be an end to the review and post-conviction efforts in a criminal case.

There is another general principle that a matter could arise that was not known and ought to qualify for an escape valve where it could be pointed out, in order to see that full justice is given.

Now, those two basic principles seem to rise to the top, like oil to the top of water. We get off into dealing with individual matters. Is there any way that we can, in a fairly simple form, address those two principles?

Basically, if a full, fair adjudicatory hearing has been held in a State court, that is finality, but if there is a real serious problem that arises, there ought to be an escape valve. I reckon what we are doing is because of the existence of present law, we are trying to look at each individual problem and trying to tailor something to it.

But is it architecturally or structurally possible to address this overall issue from a more simplistic viewpoint?

Mr. ROSE. Well, I think, Mr. Chairman, in all honesty that that is what this bill, S. 2216, tries to do. As you point out, it is a difficult drafting job, in part. It is difficult when you try to clean up some of the technical aspects of this matter, and my statement covered a number of them.

But when you get to the heart of it, as you have just done, what we are really talking about is providing a full and fair hearing for the Federal right that is being asserted. Those are precisely the words that the bill uses. If the state court has provided a full and fair hearing for the Federal right, there is no reason, except in the odd circumstances of a newly established right or the person was improperly prevented from asserting the right—the kind of a problem that you are talking about—if a full and fair hearing was held—and we do believe that that standard is rather clear; it is the standard that is used with regard to review of State rulings on exclusionary rule matters under Stone and Powell; it is a clear standard.

If a full and fair hearing has been accorded by the State court, we think both on the matter of judicial efficiency, fairness to the defendant, and as a matter of federalism and due respect to the State courts, there is not an entitlement to have a second bite at the apple in Federal court.

I think this is about as simple as you can do, and I think that is precisely what we are trying to achieve here and why we very strongly support this bill.

Senator HEFLIN. I see Chief Justice Torbert, who, I know, with Justice Sandra O'Connor and some others, studied the English criminal system. I will ask Chief Justice Torbert about it and give him a little advanced warning so he can think about it, but the standard of appeals in England is atrocious. I mean, I do not think the defendant has much of a chance.

Out of about 50,000 appeals, there is something like 150 reversals. But they usually go to an evaluation of whether or not there was overall justice rendered. Of course, they do not reverse cases and remand them; they just dismiss them. I am not saying there is any merit in it and I do not agree with it at all. But it may well give us some rationale to follow.

Come in, Mr. Chairman; I will let you sit here and ask Mr. Rose any questions you would like.

The CHAIRMAN. Thank you very much.

[Whereupon, Senator Thurmond assumed the chair.]

Senator HEFLIN. We are delighted that you could come to this committee, with your many duties that you have got everywhere.

The CHAIRMAN. Thank you very much.

Senator HEFLIN. I raise an issue where it seems that they have got a very simplistic standard which, of course, gets involved in many, many complicated decisions on a case-by-case basis. Frankly, I do not think individual rights are protected in the English system to the extent that they should be and I think there is a lot of fault with it.

But I am saying that there might be some analogy; not their language and not their situation, but some similar approach that might simplify this whole issue. I can see, under your bill and even under Senator Thurmond's bill, many, many decisions coming up and, eventually, different interpretations given.

Of course, it finally settles down, and if we want to pass one, it would probably be 10 or 15 years before we would really have the law settled enough to really know what, in the long run, it would do. But I think it would certainly bring about more finality.

But maybe I am being too optimistic; I would like to find some simple solution that protects the rights of the accused, but at the same time brings finality where full and fair adjudications have been held.

Mr. ROSE. Well, I think the statement which you made when you started out is really quite opposite, because I think Judge Friendly really captured it in the title of his article on this subject, which was something along the line of, "Is Innocence Irrelevant?" I think that is the point that we have gotten to in the complexities of some of these remedies, and I think this bill would make a very serious effort to bring the remedies back into balance with the rights they are meant to achieve.

I am not clear that there is a technically simple way of doing this in terms of drafting, but I think the full and fair hearing concept, for example, which this bill uses is about as close as you can get to the standard that you would like to apply and have met before the right to Federal habeas corpus is denied.

Good morning, Mr. Chairman.

The CHAIRMAN. Mr. Rose, we are mighty glad to have you with us. I have got several engagements this morning, but I have a couple of questions that I would like to propound to you very briefly.

In regard to the 1-year statute of limitations provision found in proposed subsection (e), is there a possibility that measuring the time from which the statute of limitations period commences from the time at which State remedies are exhausted could result in a wide range of judicial interpretations as to when that period begins to run?

Mr. **Rose**. I do not think so, Mr. Chairman. We were focusing on this a bit before you came in, and the point of choosing that particular cutoff period—and S. 653, your original bill, chooses a different one, which is the finality of State judgment—was to simply insure that all of the State process had been completed before the period would begin to run, so that people would exercise all their rights to State habeas corpus, for example, after their conviction was final and then move on into Federal court, and not give an incentive to States to delay their own habeas corpus procedures so that they would not have to therefore undergo the review by Federal habeas corpus. The States that dealt with their collateral relief faster would have more of their convictions reviewed in Federal courts.

It is a fairly technical subject, but I think it would provide a pretty precise standard.

The **Chairman**. Thank you. Now, in regard to the statute of limitations period, could you explain when the period begins to run under subsection (e)(3)? For example, would the time period begin to run for a prisoner in Florida when a Federal district judge in California initially recognized a particular right?

Mr. **Rose**. I think, rather than freelance on that, I would like to look at the provision, if I might. The provision that you were referring to was 2253, Mr. Chairman?

The **Chairman**. Section (e)(3) on page 2 of the bill.

Mr. **Rose**. Well, this has to do with the question of when you have a case where a new Federal right is established and where the Supreme Court, for example, if I have got the particular provision you are referring to correctly, recognizes a new right and chooses, because of the fundamental nature of that right, to recognize it retroactively.

The 1 year would not run until that new right was established, because the notion is there that it is only fair that where the Supreme Court is willing to say that this Federal right should be recognized retroactively, they have decided as a matter of policy that convictions should be permitted to go back and be upset, if that is the fundamental nature of that right. But that would be an unusual case.

The **Chairman**. Thank you very much. I have another committee in session. I will turn it over to the distinguished Senator from Alabama; a former chief justice of the Alabama Supreme Court, incidentally, and a very able lawyer.

Mr. **Rose**. It was very nice to see you, Mr. Chairman.

[Whereupon, Senator Heflin resumed the chair.]

Senator **Heflin**. Thank you. I appreciate those words from the kind and very effective trial judge from the State of South Carolina in his early days.

Well, thank you, Mr. Rose; we appreciate your comments. Do you have any other statement that you want to make?

Mr. Rose. No. Thank you, Mr. Chairman; I am very happy to be here this morning.

Senator Heflin. Thank you.

[The following material was subsequently supplied for the record:]

U.S. Department of Justice
Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman,

In accordance with my testimony given on April 1, 1982, before the Judiciary Committee, I wish to supplement the record with the attached memoranda addressing the major issues that were raised by members of the Committee or by other persons appearing at the hearings on S. 2216.

I would also request that the record include the Administration's initial submission to Congress entitled "The Administration's Proposed Reforms in Habeas Corpus Procedures (March 4, 1982)," which consists of a letter from the Attorney General to the Vice President transmitting the Administration's proposals, a draft bill later printed as S. 2216, and a section-by-section analysis.

Sincerely,

Jonathan C. Rose

Jonathan C. Rose
Assistant Attorney General

General Queries Raised by the Committee

1. Why does S. 2216, unlike S. 653, propose no limitation on the use of magistrates?

This issue is not one of large importance to us. We would note, however, that the use of magistrates promotes efficiency by freeing judges to devote their time to cases and aspects of cases they regard as most important. The current statute restricts the magistrate's function to recommendation (no authority to effect an actual disposition), and affords any party an unconditional right to a de novo determination by the judge if he is dissatisfied with the magistrate's performance.[1] These provisions seem adequate to protect the rights of litigants.

2. When does the one year statute of limitation begin to run?

It normally runs from the time state remedies are exhausted. The notion of "exhaustion of state remedies" is taken from current statutory law (28 U.S.C. § 2254(b)) and caselaw governing access to federal habeas corpus. The general rule is that state remedies are exhausted with respect to a claim if it has once been properly presented to the highest court of the state, either on direct review or on collateral attack.[2] In addition, it is stipulated on pages 24-25 of our initial submission to Congress that state remedies are automatically exhausted if a state places a time limit on collateral attack, and the defendant fails to pursue state remedies within the state's limitation period. State remedies would be exhausted for purposes of starting the limitation period if either of these conditions were met -- proper presentation of a claim once to the highest court of the state, or expiration of a time limit applicable to state collateral remedies where the defendant fails to pursue state remedies within the time allowed.

3. In the provision of the bill governing the effect of procedural defaults, what does "state action" mean? What type of state action?

The reference is to the doctrine of Constitutional law according to which a violation of most provisions of the Constitution requires "state action." The reference is meant to incorporate by reference the existing body of caselaw defining "state action" in that sense.

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[1] See 28 U.S.C. § 636(b)(1).

[2] See Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4264, at 627-28 (1978).

4. Why a two year statute of limitations for Federal defendants and one year for state defendants?

The limitation period for federal prisoners is two years rather than one since the time afforded to the federal defendant is not in addition to however much time may be allowed by state law to pursue state collateral remedies, but starts immediately when the judgment becomes final. Given the normally earlier starting point for federal prisoners (finality), in comparison with that for state prisoners (exhaustion of state remedies), a two year period in connection with § 2255 motions establishes a rough practical parity between the time allowed for federal prisoners and the time allowed for state prisoners. This point is explained on page 45 of our initial submission to Congress.

Remarks of Senator Lawton Chiles

We are deeply appreciative of Senator Chiles' support for S. 2216, and agree completely with his view that the objectives of S. 653, which he and the chairman of the Committee introduced last year, are essentially the same as those of the Administration's proposals. As Senator Chiles accurately notes, such differences as appear are basically matters of approach or implementation. The specific points of difference noted by the Senator which appear to call for comment or response by the Administration are as follows:

1. Unlike S. 653, S. 2216 would not affect the role of magistrates in habeas corpus proceedings.

This point is addressed in our response to the "General Queries Raised by the Committee."

2. S. 653 would set up specific pre-conditions to evidentiary hearings, while S.2216 would only affect the burden of proof in such hearings.

Senator Chiles' remarks on this point appear to focus on proposed section 28 U.S.C. § 2254(e), without adequately taking into account the much more important proposed section 28 U.S.C. § 2254(d), which would give completely conclusive effect in habeas corpus proceedings to the result of full and fair state adjudications. In contrast to S. 653, S. 2216's requirement in proposed 28 U.S.C. § 2254(d) of deference to fair state processes would cover not only factual determinations, but would extend to the legal aspects of a claim, and to the state court's application of the law to the facts, where the adjudication of the claim as a whole was full and fair.

Proposed 28 U.S.C. § 2254(e) would be a provision of very little independent significance under our proposals, applying only in rare cases where the determination by the state courts of the factual aspects of a claim had been full and fair, but the claim was generally open to re-adjudication because its non-factual aspects had not been fully and fairly determined. This point is explained on pages 43-44 of our initial submission to Congress.

It is true that the specific criteria spelling out the notion of a "full and fair" hearing found in S. 653 do not appear in S. 2216, but we would have no objection to incorporating into the bill the precise definition of that notion which presently appears in "legislative history," specifically, pages 36-41 of our initial submission. Specific language codifying the intended interpretation is set out in our response to the "Remarks of Attorney General Jim Smith."

Our proposals, unlike S. 653, address the broader question of re-determination of matters previously determined in state proceedings, without specifically focusing on the conditions under which evidentiary hearings may be held. Special treatment of the latter issue appears unnecessary, since evidentiary hearings in habeas corpus proceedings are currently rare (about 2% of all cases on a national basis), and would be rarer still under proposed 28 U.S.C. § 2254(d), which would give conclusive effect to full and fair state adjudications.

Remarks of Attorney General Jim Smith

We greatly appreciate Attorney General Smith's statement of support for the Administration's proposals. The critical remarks in his prepared statement relate only to certain particular features of S. 2216. We agree with a number of his proposals for clarifying or modifying S. 2216, but do not fully agree with all of them.

1. The running of the limitation period from exhaustion of state remedies is a problematic feature of S. 2216: (a) The notion of "exhaustion" would be open to a range of judicial interpretations. (b) State-to-state variations could result from states' enactment of differing limitation periods applicable to their collateral remedies. Some states might abolish collateral remedies altogether to ensure a short period. (c) If claims have been properly raised on appeal, no subsequent pursuit of state collateral remedies should be required to start the running of the limitation period.

(a) The notion of "exhaustion of state remedies" is not overly vague. It has a precise meaning under current caselaw. Since exhaustion of state remedies is currently required as a prerequisite to seeking federal habeas corpus, a determination as to whether exhaustion has occurred is presently made in connection with nearly all habeas corpus petitions.

The general rule is that state remedies have been exhausted with respect to a claim when it has once been presented to the highest court of a state, either on direct review or on collateral attack. [1] In addition, our initial submission to Congress stipulates at pages 24-25 that state remedies are automatically exhausted if a state places a time limit on collateral attack, and the defendant fails to pursue state remedies within the time limit. [2] For purposes of starting the running of the limitation period under proposed section 28 U.S.C. § 2244(e), state remedies would be exhausted if either of these conditions were satisfied.

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[1] See Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4264, at 627-28 (1978).

In general, under our proposals, collateral attack on state judgments in federal court would never be available on a significantly more permissive basis than collateral attack in the courts of a particular state. If a particular state concluded that the interest in finality required that a time limitation be placed on resort to its collateral remedies, [3] resort to federal habeas corpus would be subject to a corresponding constraint. If the time limit expired and the defendant had not pursued state remedies within the time allowed, access to federal habeas would become unavailable a year beyond that point.

(b) Under S. 2216, the practical operation of the federal limitation period for access to federal habeas corpus would be subject to some state-to-state variation, depending on state decisions concerning the time allowed for pursuing state collateral remedies. However, this general type of variation in access to federal habeas corpus depending on the particulars of state procedure is not uncommon. For example, state remedies must be exhausted under the current system before federal habeas is sought. What the petitioner must do -- and how much time and effort is required -- to exhaust state remedies properly depends quite directly on the individual state's rules of procedure and other aspects of the operation of its court system. Similarly, whether the petitioner has committed a procedural default in state proceedings that may bar subsequent habeas review depends directly on state rules of procedure governing the time or manner in which federal claims must be raised. State-to-state variations in access to federal habeas corpus, where the operation of a limiting federal rule depends on the particulars of state procedure, are not generally unfair or incongruous, but are simply an incident of the federal system.

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[2] The stipulation that exhaustion has occurred in such a situation does not directly follow from the general formula governing the exhaustion inquiry, see text accompanying note 1 supra, but it is almost certainly consistent with the way a federal habeas court would currently handle such a case. If a general limitation period on application for state collateral remedies had expired, a federal habeas court would not send the petitioner back to the state courts to exhaust state remedies, since it would be apparent that no such remedies remained open to him.

In case a state has replaced the traditional bifurcated system of direct review and collateral attack with a unitary system of review -- either in general or in connection with particular types of cases -- the expiration of the time for seeking such unitary review would have the same effect.

[3] A model for a general limitation rule applicable to the means of collateral attack available within a single court system is provided in section 6 of S. 2216, which would impose a two year limitation period on § 2255 motions by federal prisoners, subject to some narrow exceptions.

The suggestion that states might abolish state collateral remedies altogether seems fanciful. The states would not cripple their own judicial systems, and deny fairness in state proceedings to defendants with claims that could not be raised on direct review, on account of the limited value such reforms might have in narrowing the availability of federal habeas corpus under S. 2216. In any event, S. 2216 provides the states with a strong practical incentive to maintain adequate mechanisms of collateral review which are held open for a reasonable amount of time. Insofar as the state has provided a full and fair adjudication of a claim, that determination could not be disturbed in a subsequent federal habeas corpus proceeding in light of proposed section 28 U.S.C. § 2254(d). But if no means for raising collateral claims were available in the state, all such claims would be initially litigated in federal habeas corpus proceedings, with no prior state determination to which deference must be accorded. Hence, the overall effect of S. 2216 would be to encourage the states to maintain and improve collateral remedies that afford full and fair adjudications of federal claims.

(c) If a claim had been properly presented on direct review and rejected by the highest court of the state, exhaustion would occur at that point under the general rule defining the notion of exhaustion of state remedies.[4] Subsequent pursuit of collateral remedies would not be required to start the running of the limitation period.[5]

2. The provision for "state action" as a ground of cause for a procedural default should be qualified to limit the ground to judicial or prosecutorial state action.

This proposal is inconsistent with the purpose of the cited provision of S. 2216. It would eliminate as a ground of cause attorney error or misjudgment in failing to raise a claim that is so serious in the context of the case as to constitute a denial of the constitutionally effective assistance of counsel required by the sixth amendment. See our initial submission to Congress at 7-8.

3. It should be made express that new rights which waive the normal procedural bars imposed by S. 2216 must be retroactively applicable rights.

This is consistent with the Administration's intent in relation to these provisions. See our initial submission to

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[4] See text accompanying note 1 supra.

[5] See Wright, Miller & Cooper, supra note 1, § 4264 at 627-28 (Brown v. Allen held that if a state defendant had presented his federal claim on direct review, and it had been rejected, it was not necessary for him to ask the state for collateral relief based on the same issues in order to exhaust state remedies).

Congress at 12 n.16. In addition, it may be useful to clarify that the intended reference is to the recognition of new retroactive rights by the Supreme Court, rather than by lower federal courts. This point was apparently a source of some misunderstanding at the hearings. Accordingly, we would have no objection to making the following substitutions in the bill:

p. 2, lines 7-8 --

> "(2) the Federal right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable; or

p. 2, lines 23-24 --

> "(3) the time at which the Federal right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

p. 6, lines 19-20 --

> "(2) the right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable; or

p. 7, lines 11-12 --

> "(3) the time at which the right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

4. The definition of a "full and fair adjudication" appearing in the Administration's initial submission to Congress at pages 36-41 should be codified and put in the text of the bill.

This is a sensible suggestion. It would avoid problems of the effectiveness of a definition appearing in legislative history, which were noted by a number of speakers at the hearings. We would accordingly have no objection to adding the following at the end of section 5 of S. 2216 [6]:

> (d) by adding a new subsection (h) reading as follows:
>
> "(h) An adjudication of a claim in state proceedings is full and fair in the sense of subsection (d) of this section unless --
>
> "(1) the adjudication did not involve a decision of the claim on the merits;

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[6] If the following material is added to S. 2216, then for purposes of conformity the word "and" should be deleted at the end of line 21 on page 5 of the bill and a semicolon followed by the word "and" should be added at the end of line 5 on page 6.

"(2) the adjudication involved an unreasonable interpretation of federal law, an unreasonable determination of the facts in light of the evidence presented, or an unreasonable disposition resulting from the application of the law to the facts;

"(3) the adjudication was conducted in a manner inconsistent with the procedural requirements of federal law that are applicable to state proceedings;

"(4) new evidence is produced which could not have been produced at the time of the adjudication through the exercise of reasonable diligence, where a reasonable doubt is established that the disposition of the claim would have been the same had such evidence been produced in the state proceedings; or

"(5) a retroactively applicable change in federal law which is binding on the courts of the state has occurred subsequent to the adjudication, where a reasonable doubt is established that the disposition of the claim would have been the same had the changed law been applied in the state proceedings.

"The same definition shall apply to the term "full and fair" in subsection (e) of this section, insofar as it is applicable to the determination of factual issues.".

Remarks of Professor Stephen Gillers on behalf of the ACLU

We appreciate Professor Gillers' support for some of the reforms proposed in S. 2216. While we do not believe that his criticisms constitute valid objections to any features of the bill, they obviously reflect extensive study of and reflection on the Administration's proposals.

Before turning to specific objections, it would be well to address an underlying assumption that appears to run all through the prepared testimony. The apparent assumption is that the subject matter addressed by S. 2216 is properly within the domain of the Supreme Court and the lower federal courts, and that Congress is acting as an interloper when it enters the area, whose efforts will almost certainly be harmful. Caselaw development is consistently touted over legislative reform. Conclusory criticisms repeatedly occur in the form of observations that proposals in S. 2216 would overrule existing caselaw.

We take it as axiomatic that, on the contrary, the definition of the scope and availability of legal remedies, within the broad limits set by the Constitution, is essentially a legislative function. The courts cannot be faulted for deciding such matters when Congress fails to provide them with adequate guidance. However, suggesting that Congress should defer to the judiciary on such questions amounts to saying that legislators should not engage in legislation, but should leave that function to judges. There is no greater validity to this idea than there would be to the corresponding suggestion that the courts should defer to the legislature on the adjudication of particular cases.

Where S. 2216 overrules existing cases, the overruling is intentional, and reflects a considered judgment that the pertinent features of current law are unsound. These proposed changes should be considered and assessed on their merits, rather than dismissed on a general view that the nation's lawmakers are incompetent to make law in this important area of legal remedies.

This general point aside, the principal specific objections are as follows:

1. It is imperative that the rules governing access to federal habeas corpus be flexible. This has been the consistent approach of the Supreme Court.

The Supreme Court has fashioned many rules in the area of habeas corpus jurisdiction. Some are flexible; some are perfectly rigid. The latter category includes, for example, the rule that questions of law must be re-determined, and the law must be re-applied to the facts, no matter how adequately that has been done in state proceedings. S. 2216 would replace these rigid, categorical rules of mandatory re-adjudication with a sensible, flexible approach that would make the propriety of re-adjudication depend on the adequacy of the state process. Nevertheless, the current inflexible approach is obviously preferred in the testimony under discussion. It would appear that the ban on "categorical" rules is only to apply when defendants may benefit from its application, but is to have no application where the public's interest in the prosecution of crime is implicated.

The rules proposed in S. 2216 are not, in any event, inflexible or rigid. They have been carefully designed so as to strike an appropriate balance between the desirability of flexibility and the desirability of consistency and reasonably definite standards.

2. "Cause" and "prejudice" may be partially overlapping inquiries. If "prejudice" is greater, a default may properly be excused on a lesser showing of cause. This fact is not taken account of in the Administration's proposals.

S. 2216 contemplates formally separable inquiries concerning "cause" and "prejudice." The criticism is invalid, however, in that it fails to look into the substance of the definition of "cause." As a practical matter, the "cause" asserted by habeas corpus petitioners for failing to raise a claim properly is almost invariably incompetence of counsel. Incompetence of counsel amounting to constitutional ineffectiveness qualifies as cause under proposed 28 U.S.C. § 2244(d)(1). Whether an attorney's failure to raise a claim properly is so serious as to render his assistance constitutionally ineffective obviously depends quite centrally on the importance of the claim that was not raised to the disposition of the case. Hence, the standard of 28 U.S.C. § 2244(d)(1) allows "prejudice," in a non-technical sense, to be adequately taken account of in the decision concerning the existence of "cause."

3. S. 2216's elaboration of the notion of "cause and prejudice" would bar the assertion of claims of basic importance which were forfeited as the result of trivial defaults. For example, this would occur if a claim going to the heart of the question of guilt or innocence were forfeited because a defendant's attorney filed an appeal one day late. Another example of injustice that would result is provided by a case in which an appeal is not filed because a defendant's attorney has a stroke after trial.

The proposals of S. 2216 do not state categorical rules for such cases, but make their determination depend on the general standard of proposed 28 U.S.C. § 2244(d)(1) -- whether the state has provided the petitioner an opportunity to raise his claims that satisfied the requirements of federal law. Hence, for example, the claim in the hypothetical posed of the one-day-late appeal could be heard if the attorney's error has such serious implications for the case as to render his assistance constitutionally ineffective. Similarly, if the state courts' refusal to hear the claim amounted to a denial of due process in light of the importance of the federal right asserted and the trivial nature of the default, the default would be excused for purposes of subsequent federal habeas corpus proceedings.

The response is essentially the same in the case posed of a lawyer who suffers a stroke between trial and appeal. Under the stated facts, the failure to raise the claims properly on appeal could be excused in appropriate cases under the standard of proposed 28 U.S.C. § 2244(d) on grounds of the state's failure to provide the defendant with counsel as required by federal law, constitutionally ineffective assistance of counsel, or denial of due process.

4. Constitutionally ineffective assistance of counsel would not constitute "cause" under the standard of proposed 28 U.S.C. § 2244(d)(1), since the Supreme Court held in Polk County v. Dodson, 102 S. Ct. 445 (1981), that attorney conduct is not state action.

This objection reflects a straightforward misreading of the Polk County case. The case involved a civil suit for damages under 42 U.S.C. § 1983 against appointed counsel. The Court held that the suit would not lie because defense attorney conduct is not action "under color of law" in the sense of § 1983.

In the course of the opinion the Court noted that earlier cases had suggested an identification of the notions of "action under color of law" and "state action," but simply shrugged them off, declining to pursue the question. At a later point in the opinion, in footnote 18, the Court stated:

> In addition to possible relief under state tort law, an indigent prisoner retains the right to initiate state and federal habeas corpus proceedings. For an innocent

> prisoner wrongly incarcerated as the result of ineffective or malicious counsel, this normally is the most important form of judicial relief.

This implies that defense counsel's conduct will continue to be regarded as "state action." If it were not, ineffective assistance of counsel could not be a violation of the sixth or fourteenth amendments -- since "state action" is required for such a violation -- and a defendant in such a case would accordingly have no federal claim to raise in a habeas corpus application.

5. The limitation period proposed in S. 2216 will create a dilemma for petitioners in light of Rose v. Lundy, 50 U.S.L.W. 4272 (Mar. 3, 1982). Suppose, for example, that a prisoner has a claim on which the one-year period has started to run and a second claim which has not yet been through the state process. If he does not file the first claim, the limitation period may have run by the time the second claim is ready for federal filing. But if he files the first claim by itself, he may later be charged with abusing the writ when he later files the second claim.

No such problem arises under the *Lundy* case. In *Lundy*, the Court held that a petition presenting both exhausted and non-exhausted claims must be dismissed. As the Court explained, this means that a petitioner presenting such a "mixed" petition must either (i) amend or resubmit the petition to present only the exhausted claims, or (ii) hold off seeking federal consideration of any of his claims until he has exhausted state remedies with respect to all of them. Since the first option is available -- re-filing the claims with respect to which state remedies have been exhausted -- no dilemma of the sort posed in the objection can arise. The petitioner can immediately proceed with the exhausted claims, avoiding any problem of the limitation period expiring with respect to those claims while state remedies are being exhausted with respect to the others.

The objection appears to relate not to the Court's holding in *Lundy* -- which creates no problems under S. 2216, as explained above -- but to certain statements in Justice O'Connor's opinion in the case. Specifically, Justice O'Connor suggested that a petitioner who proceeded by re-filing exhausted claims -- rather than holding off until exhaustion had been achieved with respect to all his claims -- might face a dismissal for abuse of the writ under habeas corpus Rule 9(b) if he later presented a second petition containing the claims which had not been exhausted at the time of the initial filing. A mechanical application of this proposed rule could give rise to the problem set out in the objection. It is, however, without significance for the proposals contained in S. 2216 because it was not accepted by the Court. The portion of O'Connor's opinion proposing this approach was expressly excluded from the opinion of the Court, and was only concurred in by three other Justices (Burger, Powell, and Rehnquist). Four Justices expressly rejected this approach in separate opinions (Blackmun, Brennan, Marshall, and White). Justice Stevens did not directly address this issue in his general dissent, but it is clear from his opinion that he would also not accept a rule that would tend to compel a petitioner with important exhausted claims to refrain from proceeding on them until exhaustion had been achieved with respect to other claims presented in an initial petition. Hence, the approach on which the objection is predicated is rejected by a majority of the Court. [1]

6. Both the codification of "cause and prejudice" in S. 2216 and the proposed limitation period state exceptions for newly recognized rights. Recognized by whom?

The intended reference is to the recognition of new, retroactively applicable rights by the Supreme Court. The point is discussed more fully in our response to the "Remarks of Attorney General Jim Smith."

7. The one year limitation period is too short, given the limitations of mentality and education of the typical habeas corpus petitioner.

The limitation period runs from exhaustion of state remedies. A petitioner who has properly exhausted state remedies will usually have presented his claims previously at the trial and appellate levels in state proceedings. When a defendant has done so, it should not be unduly difficult for him to fill out and mail a simple form describing the claims and prior proceedings within a year. [2] There is really no more formality than that involved in applying for federal habeas corpus. The system has been deliberately designed to be simple and free of obstacles to filing, in recognition of the character of most habeas corpus petitioners.

8. The limitation rule would result in injustice in some cases. For example, no allowance is made for cases where the defendant was insane or incompetent, or cases in which the defendant is incarcerated pursuant to a statute later held unconstitutional.

The cases posed are apparently one in which a defendant fails to file because he was insane for a time, and does not regain his sanity until the limitation period has expired, and one in which a state continues to hold a person in custody, notwithstanding the invalidation of the statute pursuant to which he was committed. We do not disagree that a case of the sort posed involving a valid claim might arise on very rare occasions. We also do not disagree that other extraordinary cases can be imagined in which the operation of the proposed limitation rule would bar the assertion of a valid claim.

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[1] Our view concerning the significance for S. 2216 of the rule supported by a minority of the Court in Lundy would not be changed in the unlikely event that a majority of the Court came to support it prior to the bill's enactment. The proposed rule was formulated against the background of the current system, in which holding off the presentation of an exhausted claim defers its consideration for a while, but cannot result in its being time-barred. Such a rule would obviously need to be re-considered by the Court in the changed context resulting from the limitation rule contained in S. 2216.

[2] See Model Form for Use in Applications for Habeas Corpus Under 28 U.S.C. § 2254, 28 U.S.C. foll. 2254.

We find little force, however, in this type of objection. Criticisms of this sort are invariably made in relation to proposals that contemplate any change in existing federal habeas corpus jurisdiction. An unusual case is hypothesized involving a valid claim which might be heard under the present system, but would be barred under the proposed reforms. The example is then held up as proof that the proposed reforms are unsound.

Such criticisms rest on a basic misconception of federal habeas corpus as providing unqualified assurance that every violation of a federal right will be redressed and that every injustice will be corrected. Federal habeas corpus has never had that character, does not presently have that character, and could not conceivably have that character.

A state prisoner who found conclusive proof of his innocence after the conclusion of state proceedings could not on that account presently secure relief by applying for federal habeas corpus. Only violations of federal rights by the state can be asserted, and the fact of innocence does not establish such a violation. Similarly, a state defendant who was wrongfully incarcerated as the result of an egregious misinterpretation of state law by the state courts could not apply for federal habeas corpus.

Moreover, even if a state defendant does have a valid claim of a violation of a federal right, he usually faces insurmountable obstacles to securing relief through federal habeas corpus under the current system. If he is only sentenced to a fine, he has no access to habeas corpus, since it can only be used to challenge unlawful custody. If he is sentenced to less than a few years in prison, securing effective relief from the sentence through federal habeas corpus is generally not possible, since he will be out of jail by the time state remedies have been exhausted. If he has pleaded guilty -- as about 80% of criminal defendants do -- a federal habeas court will usually be barred from entertaining a claim of an antecedent violation of a federal right under the rule of McMann v. Richardson, 397 U.S. 759 (1970), and Tollett v. Henderson, 411 U.S. 258 (1973).

If these hurdles are surmounted, others still remain. If the petitioner has not raised a valid claim properly in state proceedings, and cannot establish "cause and prejudice" as required by Wainwright v. Sykes, he may be barred from raising it on application for federal habeas corpus. Even in situations where the more permissive rule of Fay v. Noia, 372 U.S. 391 (1963), still applies, a federal habeas court may decline to entertain the claim if state procedures were "deliberately bypassed." If the petitioner has unreasonably delayed in raising a valid claim and prejudice has resulted to the state, the habeas court may decline to entertain it under Rule 9(a) of the habeas corpus procedural rules. If his claim is unlawful search or seizure, it will not be heard if the state has provided an opportunity for a full and fair litigation, in light of the rule of Stone v. Powell, 428 U.S. 465 (1976).

Given the variety of restrictions which presently can prevent and regularly do prevent valid federal claims from being presented in federal habeas corpus proceedings, it is difficult to attach much weight to objections which depend on depiction of isolated cases in which such claims would be barred under our proposals. If objections of this sort were valid, they would be equally fatal to the present system of federal collateral review. The current system, no less than that proposed in S. 2216, reflects an accommodation of the interest in protecting federal rights with competing interests reflecting concerns of federalism and the needs of criminal justice. The accommodation effected by the Administration's proposals is different from that currently made, but it cannot validly be criticized as inadequately protecting federal rights. Beyond all the remedies and levels of review afforded by the state, federal habeas corpus would be made available to every state prisoner for a reasonable period of time following the conclusion of the state process, and re-adjudication of any claim would be allowed if it were shown that the state adjudication was not full and fair.

9. If a limitation rule is retained, it should at least be subject to an exception where the need to grant the writ is compelling and the failure to do so would result in manifest injustice.

We would not favor subjecting the limitation rule to such a vague exception. Doing so would undermine its value in establishing a definite end to litigation, and raise problems of subjectivity like those arising under the essentially standardless laches doctrine of current Rule 9(a).

We do not find the arguments offered in support of such an exception persuasive, for reasons explained above. However, we recognize that some members of the Committee may not share our conclusions. If an accommodation is required on this point to secure approval of S. 2216, we would suggest that it be implemented by adding at the end of proposed section 28 U.S.C. § 2244(e) in section 2 of the bill the following additional language:

> "In an extraordinary case, to prevent or correct a manifest miscarriage of justice, an application may be entertained notwithstanding the expiration of the limitation period specified in this subsection. A circuit or district judge who entertains an application in such circumstances shall make an express determination, supported by specific findings and conclusions, that the application is an appropriate one for consideration after the expiration of the limitation period."

If such a qualification -- which we do not favor -- were incorporated in the bill, we would also strongly urge that legislative history appear in the Committee Report stating that (i) the exception is to be applied narrowly and strictly, being confined to cases involving mob-domination, official oppression or corruption, or other plainly appearing extraordinary circumstances that render the state proceedings a complete miscarriage of justice, and (ii) on review of the district court's decision in such a case, the court of appeals should engage in the most critical scrutiny of the district court's determination that an out-of-time application is proper and the supporting findings and conclusions.

If an exception of the sort described above were added to the proposed limitation rule applicable to state prisoners' habeas corpus applications, it would not necessarily follow that a like exception should be recognized to the proposed limitation rule for federal prisoners' applications for collateral relief. The perceived need for such an exception on the part of those who would support it may reflect a degree of distrust of state judicial processes. The same rationale would not apply in connection with federal prisoners. If a comparable exception for the limitation rule applicable to § 2255 motions is nevertheless required, it could be similarly implemented by the addition of the following language at the end of the proposed new final paragraph to § 2255 in section 6 of the bill:

> "In an extraordinary case, to prevent or correct a manifest miscarriage of justice, a motion may be entertained notwithstanding the expiration of the limitation period specified in this paragraph. A court which entertains a motion in such circumstances shall make an express determination, supported by specific findings and conclusions, that the motion is an appropriate one for consideration after the expiration of the limitation period.".

10. The limited review of questions of law contemplated by the "full and fair" standard for re-adjudication is without precedent. Use of a standard of reasonableness is particularly objectionable, and would have strange effects on Supreme Court review.

Standards of review analogous to those proposed in S. 2216 are not uncommon. For example, an appellate court's decision to reverse on the basis of an error of law that was not properly raised by the appellant may depend on the application of a standard of "plain error." Under the rule of Stone v. Powell, a federal habeas court's review of a fourth amendment exclusionary rule claim is limited to the question of whether the petitioner was afforded an opportunity for full and fair litigation of the claim. The application of this limiting standard of review is not confined to the factual aspects of such a claim.

In Supreme Court review of a district court's determination of a habeas corpus application, the Court would determine whether the district judge had decided the case in conformity with the rules and standards proposed in S. 2216. This is consistent with the Court's current practice in reviewing habeas corpus proceedings, under which it does not reach the merits of a petitioner's claims if it finds that the district court did not abide by a rule limiting the scope of habeas review, e.g., the rules of Stone v. Powell and Wainwright v. Sykes. This would not have the effect of walling off any legal issue from consideration by the Court, since any issue could still be presented to the Court by seeking direct review. S. 2216 would, of course, have no effect whatsoever on direct review of state judgments by the Supreme Court.

11. The reforms contemplated by S. 2216 are unnecessary, because habeas corpus applications currently create no real burden.

Considerations of caseload burdens and judicial economy are not the only supports of our proposals, or the most important ones. More significant objectives include appropriate recognition of the independent stature of the state courts, fostering state responsibility in the enforcement of federal rights, and the establishment of finality in criminal adjudication. However, since efficiency is one of our objectives, and reform proposals are invariably met with assertions that the current system is not significantly deficient in that regard, it is worthwhile to address this point at some length.

In numerical terms, the number of habeas corpus petitions by state prisoners started at an annual rate of a few hundred a year in the 1950's. It grew rapidly in the 1960's and peaked at over 9,000 in 1970. It then declined in the 1970's and held fairly steady in the vicinity of 7,000 between 1977 and 1980. But then last year it jumped to about 7,800. Overall, it is apparent that habeas corpus petitions have continued at a high level, and that there is no reason to expect a large or consistent decline in the foreseeable future.

The assertion that disposing of this mass of largely frivolous petitions causes no substantial burden is contradicted by the testimony of those responsible for dealing with them. For example, Judge Friendly of the Second Circuit Court of Appeals has characterized the present system of collateral attack as "a gigantic waste of effort." [3/] The underestimations by opponents of habeas corpus reform of the burden imposed under the current system usually rest on citation of uninformative statistics. For example, it is noted that relatively few habeas corpus proceedings involve evidentiary hearings or full-dress

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3/ Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 148 (1970).

trials, and it is then inferred that most petitions are dismissed with little expenditure of time or effort. However, as Judge Friendly has noted: "The conclusion does not follow at all: a petition may require large expenditure of time by district and circuit judges even though no evidentiary hearing is held." [4]

The resources required are not limited to those of the federal judiciary, but include those of the state courts. Federal habeas corpus cannot be sought unless state remedies are first exhausted, so the lure of another level of review in the federal courts leads to increased recourse to state collateral remedies by state prisoners. As Judge Friendly has stated: "[T]he ability of the federal courts to dispense with evidentiary hearings in a large proportion of the state prisoner petitions is due in considerable measure to state post-conviction trials...." [5]

The work required of state attorney general offices should also not be overlooked. An extensive study of federal habeas corpus commissioned by the Department of Justice and carried out by Professor Paul Robinson in 1979 paints a more complete picture:

> In many cases the greatest expenditure of resources may be by the state and its counsel. In 52.8% of all cases the government was asked to send records concerning the case. In 61.1% of the cases, it filed factual responses to allegations of the petitioner and in 55.1% it filed a legal brief. In 2.2% of all cases filed, it appeared at one or more evidentiary hearings held either by the magistrate or the court; in 2.3% it appeared for legal arguments; and in 0.9% for a conference with the court. In 8.3% of the cases, the state or federal government also bore the expense of appointed defense counsel. [6]

Finally, following the conclusion of state and district court proceedings, there is frequently further work generated at the federal appellate level. The empirical study cited earlier found:

> More than 25% of the cases were...appealed... all of which had to be considered by the court of appeals. In at least 24.9% of these cases the court of appeals heard legal argument. In 42.2% the court wrote either an opinion or a memorandum opinion. These

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[4] Friendly, supra note 3, at 144 n.10.

[5] Id.

[6] P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 22 (Dept. of Justice 1979).

appeals also require, of course, further expenditure of resources by defense counsel and the state. [7]

Hence, it is apparent that the resources required under the current system are substantial. It is also widely agreed that any resulting contribution to the quality of justice administered in the nation's courts is slight indeed. S. 2216 would reduce the present burden by substituting a reasonable, limited standard of review -- the "full and fair" standard of proposed 28 U.S.C. § 2254(d) -- for the current rules of mandatory re-adjudication. Other measures promoting efficiency include allowing denial on the merits without requiring exhaustion of state remedies, reforming the current duplicative and wasteful procedure governing the issuance of certificates of probable cause for appeal in habeas corpus proceedings, and establishing a certificate requirement for appeals in § 2255 proceedings.

Remarks of Phylis Skloot Bamberger on Behalf of Defender and Legal Aid Organizations

The voluminous statement submitted on behalf of the Defender's Organizations is partially taken up with responses to justifications for habeas corpus reform which have not been advanced in connection with the Administration's proposals, and with discussions of a number of issues whose relationship to the reforms proposed in S. 2216 is at best tangential. Of the more specific points raised in relation to the bill's proposals, most have been addressed in one way or another in our initial submission to Congress, in the testimony of Assistant Attorney General Jonathan Rose, or in the accompanying responses to the remarks of other speakers at the hearings.

In relation to this testimony, we would supplement our earlier statements and submissions only to express our disagreement with the view that the proposed limitation period or other features of the bill would contravene the Suspension Clause. This issue was addressed in Chief Justice Reynoldson's testimony. An opinion of the Office of Legal Counsel, which addresses the same issue, is attached for the Committee's reference.

7/ Id. at 22-23.

Office of the Attorney General
Washington, D.C. 20530

March 3, 1982

IDENTICAL SUBMISSION
TO THE SPEAKER OF THE
HOUSE OF REPRESENTATIVES

Honorable George Bush
President of the Senate
United States Senate
Washington, D. C.   20510

Dear Mr. President,

Enclosed for your consideration and referral is a legislative proposal, "To reform habeas corpus procedures."

The proposal is part of the Department of Justice's legislative program for the 97th Congress. The Office of Management and Budget has advised me that this legislation is in accord with the legislative program of the President. We urge the Congress to give this legislation its prompt and favorable consideration.

The Administration is firmly committed to the enforcement and protection of federal rights including the federal rights of criminal defendants in state proceedings. We believe, however, that there is no justification in the present day for the availability of federal habeas corpus as a routine means of review of state criminal convictions. In light of the expansion and development of state collateral remedies in recent years and the present competence and outlook of state judges concerning federal rights, review of state judgments by the lower federal courts through habeas corpus is at most justifiable as a backstop or fail-safe mechanism to guard against the rare instances in which state courts may have acted in defiance or disregard of federal law. Moreover, federal habeas corpus procedures should reflect a scrupulous regard for the integrity of state procedures and an appropriate recognition of the state courts as trustworthy expositors of federal law.

Judged against these standards, present habeas corpus procedures have been widely recognized to be seriously deficient and in need of legislative reform:

> The most controversial and friction-producing issue in the relation between the federal courts and the states is federal habeas corpus for state prisoners. Commentators are critical of its present scope, federal judges are unhappy at the burden of thousands of mostly frivolous petitions, state courts resent having their decisions reexamined by a single federal district judge, and the Supreme Court in recent terms has shown a strong inclination to limit its availability. Meanwhile, prisoners thrive on it as a form of occupational therapy and for a few it serves as a means of redressing constitutional violations.

Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4261, at 588 (1978).

In part, the current problems with the rules governing habeas corpus reflect an excessive concern with procedural formalisms which do little in substance to promote the interests of justice, but can, by the burdens they create, defeat the essential objectives of our criminal justice system. Judge Learned Hand identified this danger as long ago as 1923:

> Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

In putting forward our proposals, we do not mean to disparage the salutary measures the Supreme Court has taken in recent years to establish a more appropriate scope of review of state court judgments in such areas as guilty pleas, fourth amendment exclusionary rule claims, and procedural defaults. See McMann v. Richardson, 397 U.S. 759 (1970); Stone v. Powell, 428 U.S. 465 (1976); Wainwright v. Sykes, 433 U.S. 72 (1977). We believe, however, that further reforms are necessary and should be accomplished through legislation. This reflects, in part, our general view that the creation of legal remedies, and the delineation of the scope of such remedies, are most appropriately legislative functions. It also reflects the limitations under which the courts operate in instituting such reforms -- the constraints imposed by precedent and the language of existing statutes and the need to proceed in a piecemeal fashion, reacting to the facts of particular cases. We are strengthened in our conviction concerning the need for legislative action by the recent statement of the Chief Justice in his 1981 Year End Report on the Judiciary urging Congress to consider limiting federal collateral review of state court criminal convictions.

While our proposals rest primarily on considerations of federalism and appropriate recognition of the dignity and independent stature of the state courts, we believe that they will also tend to reduce the level of resources required of the states and the federal courts under the current system, and will accord more appropriate weight to the interest in finality in criminal adjudication. The latter considerations are also pertinent to applications for collateral relief by federal prisoners pursuant to 28 U.S.C. § 2255. Accordingly, we are also advancing certain proposals in connection with § 2255 motions by federal prisoners.

The specific changes proposed by our amendments are as follows:

-- The amendments would ordinarily bar consideration by a federal habeas corpus court of a claim that has not been properly raised in state proceedings where the state has provided an opportunity to raise the claim that is consistent with the requirements of federal law.

-- The amendments would establish a one year limitation period, normally commencing at the time when state remedies are exhausted, for application for federal habeas corpus, and a corresponding limitation for § 2255 motions.

-- The amendments would vest the authority to issue certificates of probable cause for appeal in habeas corpus proceedings exclusively in the courts of appeals and would impose a similar requirement in relation to appeals by federal prisoners in § 2255 proceedings.

-- The amendments would clarify that applications for writs of habeas corpus can be denied on the merits without requiring exhaustion of state remedies.

-- The amendments would require deference to state determinations of factual and legal matters that have been fully and fairly adjudicated in state proceedings.

We believe that these reforms would establish a more appropriate scope and function for federal collateral remedies without jeopardizing the legitimate protection of federal rights. We look forward to working with Congress to achieve the passage of this legislation.

Sincerely,

William French Smith

William French Smith
Attorney General

A BILL

To reform Habeas Corpus procedures, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as The "Habeas Corpus Reform Act of 1982."

SEC. 2. Section 2244 of title 28, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) When a person in custody pursuant to the judgment of a state court fails to raise a claim in state proceedings at the time or in the manner required by state rules of procedure, the claim shall not be entertained in an application for a writ of habeas corpus unless actual prejudice resulted to the applicant from the alleged denial of the federal right asserted and --

"(1) the failure to raise the claim properly or to have it heard in state proceedings was the result of state action in violation of the Constitution or laws of the United States;

"(2) the federal right asserted was not recognized prior to the procedural default; or

"(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

"(e) A one year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period shall run from the latest of the following times:

"(1) the time at which state remedies are exhausted;

"(2) the time at which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such state action;

"(3) the time at which the federal right asserted was initially recognized; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence."

SEC. 3. Section 2253 of title 28, United States Code, is amended to read as follows:

"§ 2253. Appeal

"In a habeas corpus proceeding or a proceeding under section 2255 of this title before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a state court, or from the final order in a proceeding under section 2255 of this title, unless a circuit justice or judge issues a certificate of probable cause."

SEC. 4. Federal Rule of Appellate Procedure 22 is amended to read as follows:

"Rule 22.

"HABEAS CORPUS AND § 2255 PROCEEDINGS

"(a) Application for an Original Writ of Habeas Corpus. An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

"(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, and in a motion proceeding pursuant to 28 U.S.C. § 2255, an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause. If a request for a certificate of probable cause is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or the government or its representative, a certificate of probable cause is not required."

SEC. 5. Section 2254 of title 28, United States Code, is amended by redesignating subsections "(e)" and "(f)" as subsections "(f)" and "(g)" respectively, and is further amended --

(a) by amending subsection (b) to read as follows:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the applicant. An application may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.";

(b) by adding a new subsection (d) reading as follows:

"(d) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in state proceedings."; and

(c) by redesignating subsection "(d)" as subsection "(e)," and amending it to read as follows:

"(e) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a full and fair determination of a factual issue made in the case by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting this presumption by clear and convincing evidence."

SEC. 6. Section 2255 of title 28, United States Code, is amended by deleting the second paragraph and the penultimate paragraph thereof, and by adding at the end thereof the following new paragraphs:

"When a person fails to raise a claim at the time or in the manner required by federal rules of procedure, the claim shall not be entertained in a motion under this section unless actual prejudice resulted to the movant from the alleged denial of the right asserted and --

> "(1) the failure to raise the claim properly, or to have it heard, was the result of governmental action in violation of the Constitution or laws of the United States;

"(2) the right asserted was not recognized prior to the procedural default; or

"(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

"A two year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of the following times:

"(1) the time at which the judgment of conviction becomes final;

"(2) the time at which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, where the movant was prevented from making a motion by such governmental action;

"(3) the time at which the right asserted was initially recognized; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence."

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SECTION BY SECTION ANALYSIS

I. INTRODUCTION

The bill proposes amendments to various sections of chapter 22 of title 28 of the United States Code and a related rule of appellate procedure in order to establish a more appropriate scope and function for federal habeas corpus for state prisoners, accord more appropriate weight to state interests in finality and orderly procedures in criminal adjudication, improve the efficiency of habeas corpus litigation and appellate review in such litigation, and effect certain corresponding improvements in the operation of collateral remedies for federal prisoners. The proposed amendments would change the operation of federal collateral remedies in several respects:

First, the proposed amendments would require federal habeas courts to refrain from granting relief with respect to matters that have been fully and fairly adjudicated in state proceedings in order to enhance the finality of state criminal adjudications and avoid duplicative litigation of claims that have already been adequately considered and decided.

Second, the proposed amendments would generally bar cognition by federal courts in habeas corpus proceedings of claims that have not been properly raised in state proceedings, provided the state has afforded the petitioner an opportunity consistent with the requirements of federal law to raise his claims in the state proceedings.

Third, the proposed amendments would establish a one-year limitation period for the filing of habeas corpus petitions by state prisoners, which would generally run from the time of exhaustion of state remedies. This limitation period would discourage or prevent the filing of petitions when the passage of time has made reliable adjudication of the petitioner's claims (or re-trial of the petitioner) difficult or impossible. The limitation period would also advance the policies supporting finality and repose in criminal adjudication.

Fourth, the proposed amendments would clearly state that a federal habeas court can deny a habeas petition on the merits without requiring prior exhaustion of state remedies, thereby avoiding the waste of judicial resources that results when a person presenting a frivolous petition is sent back to the state courts to exhaust state remedies.

Fifth, the proposed amendments would vest in the judges of the courts of appeals exclusive authority to issue certificates of probable cause for appeal in habeas corpus proceedings. This would entrust the decision concerning the propriety of an appeal to the judges who are in the best position to determine if there is a realistic likelihood of reversal. It would also avoid duplicative consideration of the suitability of a case for appeal, first by a district judge, and then by a circuit judge.

Sixth, the proposed amendments would make similar changes in the law governing applications for collateral relief by federal prisoners pursuant to 28 U.S.C. § 2255 in the areas of appeal, procedural default and time limitation.

In general, the bill sets forth the proposed amendments in the order in which the statutes to be amended appear in chapter 22 of title 28. This section-by-section analysis describes the proposed amendments in the same order.

The proposed amendments address many of the same subjects as Recommendation 42 of the Attorney General's Task Force on Violent Crime [1/] and bill S. 653, which is presently before the Subcommittee on Courts of the Senate Judiciary Committee. Comparisons between our proposed

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[1/] See Final Report of the Attorney General's Task Force on Violent Crime 58-60 (Dept. of Justice 1981) [hereafter cited as "Recommendation 42"].

amendments and the corresponding provisions of Recommendation 42 and S. 653 will be made at various points in this analysis.

II. SECTION 1 OF THE BILL -- POPULAR NAME

Section 1 of the bill states that the Act may be cited as the "Habeas Corpus Reform Act of 1982."

III. SECTION 2 OF THE BILL -- PROPOSED AMENDMENTS TO 28 U.S.C. § 2244 RELATING TO PROCEDURAL DEFAULTS IN STATE PROCEEDINGS AND THE TIME FOR FILING APPLICATIONS FOR HABEAS CORPUS

Section 2 would add two new subsections to 28 U.S.C. § 2244. The first new subsection would clarify and partially change the law concerning consideration of a claim by a federal habeas court if the petitioner has not complied with state procedural rules directing when or how a claim must be raised in state proceedings. The second new subsection would establish a one-year limitation period within which state prisoners must apply for federal habeas corpus. The limitation period would run in most cases from the time state remedies have been exhausted.

A. The Effect of Procedural Defaults

Under current law, the effect of a petitioner's failure to raise a claim properly in state proceedings is governed by two cases: Fay v. Noia [2] and Wainwright v. Sykes. [3] In Fay, the Supreme Court held that a federal habeas court could decline to hear a claim if the petitioner "deliberately bypassed" state procedures. In Wainwright, however, the Court held that regardless of whether the petitioner had "deliberately bypassed" state procedures, certain types of procedural defaults by a petitioner would not be excused unless the petitioner could establish "cause" for the default and "actual prejudice" resulting from the failure of the state court to hear the claim.

Proposed subsection (d) of 28 U.S.C. § 2244 addresses the subject of procedural defaults presently governed by Fay and Wainwright. Because it would apply only in cases where a petitioner failed to raise a federal claim at the time or in the manner required by state procedural rules, proposed subsection (d) would have no bearing on a federal court's consideration of a habeas claim which state procedural rules did not require to be raised at any particular time or in any particular manner. Hence, in the rare cases where a state provided no mechanism for raising a certain type of federal claim, proposed subsection (d) would permit federal habeas courts to consider the claim, since there could be no state procedural rule in such cases requiring that the federal claim be raised at a particular time or in a particular manner.

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[2] 372 U.S. 391 (1963).

[3] 433 U.S. 72 (1977).

Proposed subsection (d) would allow a claim which had not been properly raised in state proceedings to be raised in an application for federal habeas corpus only if the petitioner established (i) that "actual prejudice" had resulted from the alleged denial of the federal right asserted and (ii) that there was "cause" for the default. "Cause" is defined to exist if one of three conditions is satisfied.

1. "Actual Prejudice" and "Cause"

Under current law, most courts applying the test of Wainwright v. Sykes have essentially treated the requirement of "actual prejudice" as a variant of the harmless error doctrine of Chapman v. California. [4] Under this approach, the petitioner must establish reasonable doubt over whether the conviction, sentence or other disposition complained of would have occurred in the absence of the alleged error underlying his claim. [5]

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[4] 386 U.S. 18 (1967).

[5] See generally id. at 24; Goodman & Sallett, Wainwright v. Sykes: The Lower Federal Courts Respond, 30 Hastings L.J. 1683, 1694-1707 (1979).

We approve of this interpretation of the "actual prejudice" requirement of Wainwright, and intend that the "actual prejudice" requirement of proposed subsection (d) be understood in the same sense.

Wainwright's requirement of "cause," by contrast, has been a source of great uncertainty and division in the lower federal courts. [6] The question has been presented most frequently, and most acutely, in cases where there is attorney error or misjudgment that prevents the petitioner's claim from being raised, but falls short of constitutional ineffectiveness of counsel. [7] Some courts would apparently not regard such lesser degrees of attorney error as cause. [8] Others have explicitly or implicitly disagreed, employing a wide variety of formulations and approaches. [9] We agree with the view that lesser degrees of attorney error do not constitute "cause."

6/ See Goodman & Sallett, supra note 5, at 1707-24.

7/ See id.

8/ Cf., e.g., Indiviglio v. United States, 612 F.2d 624, 631 (2d Cir. 1979) (applying cause standard set forth in Davis v. United States, 411 U.S. 233 (1973), to federal prisoner's § 2255 motion), cert. denied, 445 U.S. 933 (1980).

9/ See, e.g., Farrow v. United States, 580 F.2d 1339, 1356-57 (9th Cir. 1978); Collins v. Auger, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978), cert. denied, 439 U.S. 1133 (1979); Jiminez v. Estelle, 557 F.2d 506, 510-11 (5th Cir. 1977). See also Tyler v. Phelps, 622 F.2d 172, 176-78 (5th Cir. 1980), vacated on rehearing, 643 F.2d 1095, 1101 (1981).

The proper question -- in regard both to attorney error and to defaults resting on other grounds -- is whether the state provided the petitioner with an opportunity to present his federal claims that was consistent with the requirements of federal law. If such an opportunity has been provided, proper regard for the integrity of state procedures requires that "cause" be found, if at all, only under the clearest and most compelling circumstances. But if the state did not give the petitioner an opportunity consistent with the requirements of federal law to raise a claim, then due regard for the protection of federal rights warrants consideration of the claim by a federal habeas court.

This general principle would be codified in clause (1) of proposed subsection (d), which provides that a procedural default would be excused if it was the result of state action in violation of federal law. The practical effect of this standard, for example, in connection with attorney error would be that an attorney's failure to raise a claim properly would constitute "cause" only if it amounted to constitutional ineffectiveness. However, attorney errors falling short of constitutional ineffectiveness would not constitute cause.

Proposed subsection (d) also would explicitly allow cause to be found in two other circumstances:

(i) where the legal basis for the claim did not exist at the time of the default and (ii) where the factual basis for the claim was not reasonably discoverable at the time of the default. These further grounds of cause are codified in clauses (2) and (3) of proposed subsection (d). It is not apparent that such circumstances would be covered by clause (1) of the subsection, since it is unclear whether a state's failure to allow a claim to be heard under these circumstances would constitute a denial of due process. Accordingly, these two grounds have been included as independent bases for cause because they represent the clearest justifications for a procedural default. [10]

2. Relationship to Current Law

In two principal respects proposed subsection (d) may depart from current law. The first is its application of the "cause and prejudice" standard to all types of defaults and claims. The second is its failure to restrict the "cause and prejudice" requirement to cases in which the default constitutes an adequate and independent state ground that would bar direct review in the Supreme Court.

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[10] Cf., e.g., Shotwell Mfg. Co. v. United States, 371 U.S. 341, 362-63 (1963) ("cause shown" exception to Rule 12 of the Federal Rules of Criminal Procedure not met because "the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial"); Md. Ann. Code art. 27, § 645A(d) (1976) (allegation of error not finally litigated or waived where based on subsequently recognized retroactive constitutional standard).

The opinion in Wainwright v. Sykes left open the question of which categories of defaults would be subject to its "cause and prejudice" standard rather than the more permissive "deliberate bypass" standard of Fay v. Noia. In the absence of authoritative guidance from the majority opinion, lower courts have tended to rely on the Chief Justice's concurrence in Wainwright,[11] which stated that the Fay standard should continue to apply to certain basic decisions that are ordinarily made by the defendant rather than his attorney, such as the decision whether to plead guilty, waive a jury, take the witness stand, or pursue an appeal.

While the approach of Chief Justice Burger's concurrence is understandable as an expression of judicial restraint that prefers to limit the application of a discredited earlier decision rather than overrule it outright, there are sound reasons of policy supporting a different rule. We believe that it is preferable to rely instead upon the standard of clause (1) of proposed subsection (d), which is flexible enough to give appropriate weight to the distinctions noted in the Chief Justice's concurrence.

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[11] 433 U.S. at 91-94 (Burger, C.J., concurring).

For citation and discussion of lower court decisions, see Goodman & Sallett, supra note 5, at 1689-90 & n.35.

A second issue raised by proposed subsection (d) involves the proper relationship between the proposed cause and prejudice standard and the doctrine of Supreme Court practice which holds that the existence of an adequate and independent state ground will bar Supreme Court review. Unfortunately, part of the discussion in Wainwright [12] could be interpreted as incorporating the large and confusing body of case law addressing the issue of "adequate and independent state grounds" into the law governing the availability of federal habeas corpus. Such an incorporation would confuse the relevant issues and be exceedingly unwise. [13] Thus, the cause and prejudice standard as set forth in proposed subsection (d) should be the exclusive criterion by which federal courts judge the effect of procedural defaults on the availability of habeas corpus.

3. Relationship to Recommendation 42 and S. 653

The codification of cause proposed by subsection (d) of the bill is similar to the proposed codifications found in Recommendation 42 of the Attorney General's Violent Crime Task Force [14/] and section 2 of S. 653. [15/] For instance, clauses (2) and (3) of proposed subsection (d) have direct counterparts in Recommendation 42 and S. 653. [16/] There are, however, some deviations.

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[12] See Wainwright v. Sykes, 433 U.S. at 78-79, 81-87.

[13] See generally Goodman & Sallett, supra note 5, at 1690-91 & n.40.

First, Recommendation 42 and S. 653 do not expressly parallel clause (1) of proposed subsection (d). The history of those proposals indicates, however, that they were not intended to bar a finding of "cause" in cases -- such as constitutional ineffectiveness of counsel -- where the procedural default was the result of unlawful state action that would itself provide the basis of an independent habeas claim. [17/]

[14/] See text accompanying note 1 supra.

[15/] See id.

[16/] See Recommendation 42, supra note 1, at 60 (first and fourth clauses of definition); S. 653 § 2 (1981) (clauses (1) and (4) of proposed subsection (d) of 28 U.S.C. § 2244).

Both Recommendation 42 and S. 653 require explicitly that a subsequently recognized right, to constitute "cause," must be determined to be retroactive in its application. This limitation is implicit in our formulation, since the petitioner would have no basis for making a claim if the right asserted was not held to be retroactive.

[17/] See Recommendation 42, supra note 1, at 60 (apparent implication that ineffectiveness of counsel constituting a Sixth Amendment violation should be regarded as "cause"); Letter of Attorney General Jim Smith of Florida to Chief Clerk Linda White of the Senate Judiciary Committee Regarding S. 653, at 5-6 (12/2/81).

Second, both Recommendation 42 and S. 653 incorporate two clauses in their definition of "cause" that have no explicit counterpart in proposed subsection (d).

The first of these is a provision stating that "cause" exists when "the state court procedures precluded the petitioner from asserting the right sought to be litigated." [18] The situations that provision was intended to cover should be adequately covered by proposed subsection (d). For example, if a state were to provide no procedure for asserting a certain type of federal claim, then proposed subsection (d) would allow such a claim to be heard by a federal habeas court. Similarly, if state procedural requirements prevented a defendant from asserting a federal claim in a manner violative of due process, then "cause" would exist pursuant to clause (1).

The second clause of Recommendation 42 and S. 653 without an explicit counterpart in the bill is a provision that "cause" exists if "the prosecutorial authorities or a judicial officer suppressed evidence from the petitioner or his attorney which prevented the claim from being raised and disposed of." [19] This type of situation would ordinarily be covered by clause (3) of proposed subsection (d). Moreover, if the withholding of evidence from the defendant by the judge or prosecutor constituted a denial of due process under the circumstances of the case, then "cause" would exist under clause (1).

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[18] Recommendation 42, supra note 1, at 60 (second clause of definition); S. 653 § 2 (1981) (clause (2) of proposed subsection (d) of 28 U.S.C. § 2244).

[19] Recommendation 42, supra note 1, at 60 (third clause of definition); S. 653 § 2 (clause (3) of proposed subsection (d) of 28 U.S.C. § 2244).

B. Limitation of Time for Filing

1. Relationship to Current Law

Under current law, there is no definite time limit on the filing of habeas corpus petitions. The effect of delay in filing is governed by the "laches" doctrine of Rule 9(a) of the habeas corpus procedural rules. Rule 9(a) provides that a petition may be dismissed if the state has been "prejudiced" in its ability to respond to the petition by the delay in filing. However, if the petitioner can show that the delay was the result of "grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred," [20/] then his petition will be heard even if the state is prejudiced. The Advisory Committee Note to Rule 9(a) elaborates that any limitation arising from the rule may be disregarded where "(1) there has been a change

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[20/] Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. 2254.

of law or fact (new evidence) or (2) where the court, in the interest of justice, feels that the collateral attack should be entertained and the prisoner makes a proper showing as to why he has not asserted a particular ground for relief." [21]

Although Rule 9(a) is of some value in preventing delayed filing of habeas corpus petitions, it is deficient in two respects. First, the Rule does not allow any weight to be given to the prejudicial effect that the petitioner's delay may have had on the possibility of re-trial -- for example, the intervening death of a key witness. [22] Second, and more fundamentally, reasonable people will invariably differ over such terms as "prejudice" and "proper showing." Hence there is no definite end to litigation under the current standard. As a result, a petition for habeas corpus can be filed at any time without adequate weight being afforded to the law's interest in finality.

One objection that has sometimes been raised to the establishment of a more definite limitation on the time in which federal habeas corpus may be sought is that such a limitation is precluded by the constitutional nature of the rights that are typically asserted by habeas corpus petitioners. Such arguments are misconceived. The laches doctrine of current Rule 9(a) -- which was promulgated by the Supreme Court [23] -- can often have the effect of preventing a petitioner from asserting a valid constitutional claim. The same is true of the various other restrictions that are presently imposed on access to federal habeas corpus. [24] In general, it is within the power of Congress to place reasonable limitations on the time and manner in which legal rights -- including constitutional rights

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[21] H. Doc. No. 464, 94th Cong., 2d Sess. 137 (1976).

[22] See Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4268, at 701 (1978); Clinton, Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts, 63 Iowa L. Rev. 15, 48 (1977).

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[23] The original version of the Rule, issued by the Court, was actually more restrictive than the version finally approved by Congress. It created a presumption of prejudice to the state's ability to respond if the petition is filed more than five years after the judgment of conviction. See H. Doc. No. 464, 94th Cong., 2d Sess. 38-39 (1976).

[24] See, e.g., Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976); McMann v. Richardson, 397 U.S. 759 (1970); Fay v. Noia, 372 U.S. 391 (1963).

-- can be asserted.[25] It is also common to place time limitations on the assertion of various other types of claims in criminal proceedings which go to the propriety of a person's incarceration. For example, limitations are imposed by federal law on the time in which a federal defendant may decide to appeal a conviction,[26] and under Federal Rule of Criminal Procedure 33 a motion for a new trial based on newly discovered evidence may not be made more than two years after final judgment.

Thus, it is reasonable, and consistent with practice in other areas of the criminal law, to impose a limitation period on applications for federal habeas corpus. Moreover, a time limitation is necessary if state criminal judgments are ever to achieve finality. Proposed subsection (e) of 28 U.S.C. § 2244 would establish such a limitation.

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[25] See Yakus v. United States, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."). See generally Hart and Wechsler's The Federal Courts and the Federal System 317-21 (2d ed. 1973).

In light of the statutory origin in 1867 of the general habeas corpus jurisdiction of the federal courts with respect to state prisoners, we also see no difficulty arising from the Suspension Clause of the Constitution. See generally Stone v. Powell, 428 U.S. 465, 474-75 (1976); Hart and Wechsler's The Federal Courts and the Federal System, supra, at 1513-14.

[26] See Fed. R. App. P. 4(b).

2. Operation of the Time Limitation

Proposed subsection (e) would bar the assertion of claims on application for federal habeas corpus following the expiration of a one-year period. The period would normally run from the time when state remedies are exhausted since that is the earliest point at which an application for federal habeas corpus can properly be made.[27/] The limitation of this provision is meant to apply only when state remedies applicable to a claim exist. If a state provided no mechanism by which defendants could assert a certain type of federal claim, there would be no time limit upon application for federal habeas corpus relief with respect to such claims, subject only to the laches doctrine of Rule 9(a).[28/]

The general rule that the limitation period runs from the time state remedies are exhausted is set forth in subsection (e)(1). Subsections (e)(2) - (e)(4) create exceptions to this general rule. They parallel the definition of "cause" for a procedural default in proposed subsection (d).

[27/] *See generally* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4264 (1978).

[28/] *See* text accompanying notes 20-21 *supra*.

Proposed subsection (e)(2) would delay the start of the limitation period if the petitioner had been prevented from filing earlier by state action in violation of federal law. For example, in Ex Parte Hull, 312 U.S. 546 (1941), the Supreme Court was confronted with a situation in which state prison authorities prevented a prisoner from applying for federal collateral relief. [29/] Such obstruction of the assertion of federal rights was naturally held to be a violation of federal law. Clause (2) would prevent the limitation period from beginning to run should such a case (or a similar one) arise again, until the impediment to filing created by the unlawful state interference was terminated.

Proposed subsection (e)(3) would extend the starting point of the limitation period when the habeas corpus petition was grounded in a subsequently recognized federal right. If the legal basis for a claim did not exist at an earlier point, a clear excuse exists for not having raised it at that point. Moreover, the decision to apply the new right retroactively involves an implicit determination that the right is sufficiently fundamental that its importance outweighs the policies supporting finality and repose in criminal adjudication. If no state procedure for raising a claim of denial of such a right were open to a petitioner

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[29/] See generally Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 21-22 (1956).

at the time the right was initially recognized, then the limitation period would run from the time of the right's initial recognition. If state remedies were open in relation to the new right, then the limitation period would run from the time when the petitioner had exhausted such state remedies.

Proposed subsection (e)(4) would provide for delay of the normal starting point of the limitation period where the claim is based on newly discovered facts. The limitation period in such a case could not begin to run prior to the point at which the factual predicate of the claim could have been discovered through the exercise of reasonable diligence. Use of a reasonable diligence standard in fixing the starting point of a limitation period is, of course, used in a number of areas of the law. For example, in relation to actions based on certain types of securities violations, 15 U.S.C. § 77m provides: "No action shall be maintained to enforce any liability . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence. . . ."

The starting points specified by the clauses of proposed subsection (e) are meant to be applied on a claim-by-claim basis. If, for example, a petition raised two claims, A and B, of which A was time-barred by the normal operation of proposed subsection (e), but B was timely because it was based on recently discovered facts as described in clause (4), the timeliness of B would not excuse the petitioner's failure to raise A at the proper time. The habeas corpus court could consider claim B but not claim A.

3. Relationship to Recommendation 42 and S. 653

Recommendation 42 of the Attorney General's Task Force on Violent Crime and S. 653 propose a different approach to time limitation than does this bill. They would impose a limitation period of three years which would normally run from the point at which the judgment of conviction becomes final -- that is, when remedies on direct review have been exhausted, or when the time for seeking direct review has expired. [30]

This bill recommends a different approach because the formulation of Recommendation 42 and S. 653 could, under some circumstances, fail to take properly into account the elapse of time between the end of the appellate process (finality) and the time at which state remedies are exhausted, which is the earliest point at which federal habeas corpus can properly be sought. If a claim were of a sort that normally is not raised on direct review -- *e.g.*, ineffective assistance of counsel -- exhaustion of state remedies would ordinarily require pursuit of state collateral remedies following the conclusion of the appellate process. [31/] If the state collateral remedies were not exhausted within three years, application for federal habeas corpus would be time-barred before the defendant ever had an opportunity to apply for it.

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[30] See Recommendation 42, *supra* note 1, at 58-59; S. 653 § 2 (1981) (proposed subsection (e) to 28 U.S.C. § 2244); Letter of Attorney General Jim Smith of Florida to Chief Clerk Linda White of the Senate Judiciary Committee Regarding S. 653, at 4 (12/2/81).

A further problem posed under the "finality" approach is that state prisoners may resort to federal habeas corpus as a means of securing relief from administrative action affecting the conditions or duration of confinement rather than as a means of challenging the judgment of conviction or the sentence. [32/] Since the administrative action complained of may occur long after finality of judgment, many such claims would be barred by a three-year limitation period starting from finality.

[31/] *See* P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 17 n.18 (Dept. of Justice 1979).

[32/] *See* *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

Where the administrative action challenged affects the fact or duration of confinement, habeas corpus is the exclusive federal remedy. *See* *id*. at 499-500.

While we do not reject the approach of Recommendation 42 and S. 653 or variations of that approach as options meriting consideration, proposed subsection (e) offers certain advantages. Since the limitation period does not start to run until state remedies are exhausted, no problem can arise of a defendant racing the clock to exhaust state collateral remedies before a limitation period that started at finality runs out. Every state prisoner is afforded an opportunity to apply for federal habeas corpus, which is held open for at least a year.

The one-year limitation period of proposed subsection (e) might appear more restrictive than the three year period of Recommendation 42 and S. 653. The proposed one-year limitation period, however, has a different starting point. The three year period begins with finality and must cover whatever time is required subsequently to exhaust state collateral remedies. The one year period of proposed subsection (e), by contrast, does not start until state remedies have been completely exhausted. A petitioner who has properly exhausted state remedies will normally have presented his claims on appeal or in state collateral proceedings. [33] If a prisoner has previously presented his claims in state proceedings, it is reasonable to require him to delay for no more than a year before re-presenting the same claims to a federal habeas court.

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[33] See generally P. Robinson, supra note 31, at 17 & n.18.

Proposed subsection (e) might, alternatively, be criticized as providing an overly generous starting point. The one year period in proposed subsection (e) is in addition to however much time is afforded under state law for pursuit of state collateral remedies. Hence, if collateral remedies in a particular state were held open indefinitely, a prisoner might wait many years before resorting to them and exhausting them. He would thereafter be free to seek federal habeas corpus for another year no matter how long ago the occurrences pertinent to the resolution of his claim took place. Two points may be noted in response.

First, the federal time limitation under this approach would not be significantly more permissive than the approach to provision of collateral remedies taken by the law of the particular state. In effect, federal law would defer to the state's judgment concerning the proper balance between protection of the rights of defendants and the interest in finality. If the state concludes that protection of defendants' rights justifies holding open collateral remedies without limitation of time, federal habeas corpus would be available on essentially the same basis. Conversely, if a particular state concluded that the interest in finality required that a time limitation be placed on resort to its collateral remedies, resort to federal habeas corpus would be subject to a corresponding constraint. When the time for seeking collateral relief under state law had expired, the prisoner would automatically have "exhausted" state remedies at that point since no means for raising his claims in state proceedings would remain. The prisoner would then have a year to present his claims to a federal habeas court. [34]

Second, the laches doctrine of Rule 9(a) would continue to apply and could bar the assertion of claims whose presentation had been unreasonably delayed in certain circumstances notwithstanding the availability of collateral remedies without limitation of time in a particular state.

IV. SECTION 3 OF THE BILL -- PROPOSED AMENDMENTS TO 28 U.S.C. § 2253 RELATING TO APPEAL IN FEDERAL COLLATERAL RELIEF PROCEEDINGS

Section 3 of the bill would amend 28 U.S.C. § 2253 to vest in the judges of the courts of appeals exclusive authority to issue certificates of probable cause for appeal in habeas corpus proceedings. It would also create an identical certificate requirement for appeals by federal prisoners in collateral relief proceedings pursuant to 28 U.S.C. § 2255. [35]

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[34] If a petitioner had not actually resorted to state collateral remedies within the time allowed by state law, his failure to do so would have to be excusable under the cause and prejudice standard of proposed subsection (d) in order for federal habeas to be available. See section III.A.1. supra.

Under current law, to appeal a district court's adverse decision on his petition, a petitioner is required to obtain a certificate of probable cause from either the district judge or an appellate judge. The requirement of a certificate is designed to avoid the burden of a decision on the merits by an appellate panel in the absence of a prior determination by a district or appellate judge that some basis for the appeal exists. [36]

While this general approach is desirable and promotes efficiency, it is inefficient in its specific provision that either a district judge or an appellate judge may issue the required certificate. Denial of a certificate by the district court does not preclude the petitioner from subsequently applying to the appellate court for the certificate, requiring an appellate judge to take a second look at the case's suitability for appeal. If the district court does issue a certificate, the judges of the appellate court are not free to override the district court's determination, but must decide the appeal on the merits. This feature of the present system is anomalous, since it is the judges of the appellate court who are in the best position to assess whether there is a realistic possibility of reversal that would warrant issuing a certificate of probable cause.

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[35] The amendments of section 3 of the bill have been proposed by Judge Friendly of the Second Circuit Court of Appeals. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 144 n.9 (1970). They have also appeared in habeas corpus reform legislation considered in earlier Congresses. See S. 3833, 92d Cong., 2d Sess. (1972).

[36] For general discussion of the certificate requirement, see Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4268, at 715-16 (1978); Blackmun, Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases, 43 F.R.D. 343, 351-54 (1968); Developments in the Law -- Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1192-95 (1970).

Section 3 of the bill would eliminate these inefficiencies by assigning the probable cause determination in connection with habeas corpus appeals exclusively to the judges of the courts of appeals.

Although there is no certificate requirement presently imposed upon appeals by federal prisoners from district court denials of § 2255 motions, a certificate requirement is equally desirable in that context. Like habeas corpus petitions by state prisoners, motions pursuant to § 2255 seldom raise genuine issues. Given the high number of frivolous motions, a requirement that § 2255 appeals satisfy a probable cause determination is an appropriate threshold for a movant to meet before his appeal would be heard by a full appellate panel. The amendments of section 3 would impose such a requirement.

V. SECTION 4 OF THE BILL -- PROPOSED AMENDMENTS TO FEDERAL RULE OF APPELLATE PROCEDURE 22

Section 4 of the bill would amend Federal Appellate Rule 22 to bring it into conformity with the amendments to 28 U.S.C. § 2253 proposed in section 3.

VI. SECTION 5 OF THE BILL -- PROPOSED AMENDMENTS TO 28 U.S.C. § 2254 RELATING TO EXHAUSTION OF STATE REMEDIES, RE-ADJUDICATION OF MATTERS PREVIOUSLY ADJUDICATED IN STATE PROCEEDINGS, AND PRESUMED CORRECTNESS OF STATE COURT FACTUAL DETERMINATIONS

Section 5 would add a new subsection to 28 U.S.C. § 2254 and amend two existing subsections of that section. Section 5 would amend subsection (b) of § 2254 to clarify that a federal habeas corpus court can deny a petition on the merits notwithstanding the petitioner's failure to exhaust state remedies. Section 5 would add a new subsection -- proposed subsection (d) -- that would require federal habeas courts to defer to the state courts on matters fully and fairly adjudicated in state proceedings. Finally, section 5 would redesignate current subsection (d) as subsection "(e)" and shorten it, clarify it and conform it to proposed new subsection (d).

A. Denial of Frivolous Petitions Without Requiring Exhaustion of State Remedies

The purpose of the provision of the bill amending § 2254(b) is to encourage federal habeas corpus courts to deny frivolous petitions on the merits rather than dismissing them for nonexhaustion of state remedies. [37]

Currently, 28 U.S.C. § 2254(b) provides that a writ of habeas corpus "shall not be granted" if the petitioner has not exhausted state remedies. The statute does not, by its terms, prohibit a federal habeas court from denying a petition on the merits in cases of non-exhaustion. There have been some decisions that have taken the statute literally, holding that a habeas corpus petition can be denied on the merits even though the petitioner has failed to exhaust state remedies. [38] It appears, however, that exhaustion of state remedies is generally regarded as a normal prerequisite to a disposition on the merits whether favorable or unfavorable.

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[37] See Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321, 359 (1973) (unnecessary and inappropriate to dismiss petition for lack of exhaustion when lack of merit is plain).

[38] See Kelly v. Maroney, 414 F.2d 1228, 1231 (3d Cir. 1969); Drew v. Myers, 327 F.2d 174, 182-83 (3d Cir. 1964); In re Ernst's Petition, 294 F.2d 556, 561-62 (3d Cir. 1961). But see Trantino v. Hatrack, 563 F.2d 86, 95-97 (3d Cir. 1977), cert. denied, 435 U.S. 928 (1978) (indicating stricter view of exhaustion requirement).

The latter approach carries substantial costs. [39] It is generally recognized that a large proportion of habeas corpus applications by state prisoners are frivolous. If a frivolous petition is dismissed on the procedural ground that state remedies were not exhausted, the prisoner is, in effect, being told to re-petition the federal court after he has run through the state judicial process. After presenting his frivolous claims to at least two or three state courts, he may return to the federal court only to be informed that his claims are without merit. The federal court has had to consider his petition twice, first on the exhaustion issue [40] and then on the merits; state courts at several levels have had to consider his claims; and the petitioner himself discovers that years of waiting have been for naught when an adverse decision on the merits is finally obtained from the federal court. Had the federal court denied his petition on the merits when it was first presented, this needless expenditure of time and effort would have been avoided.

Permitting denial of relief on the merits in such cases, as the bill would allow, would neither frustrate nor undermine the policies supporting the exhaustion requirement. These policies -- comity, deference to state processes, and the desirability of allowing state courts to correct errors in state proceedings -- are not offended by the denial of frivolous petitions prior to exhaustion. [41] No incentive would be created for a petitioner to by-pass available state remedies and go directly to federal court, since only an unfavorable result would be possible if state remedies were not exhausted. The desirability of affording state courts an opportunity to correct errors in state proceedings would also not significantly be impaired when the lack of merit in the petitioner's claims is apparent and the federal court's options are limited to finding that no state-court error occurred.

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[39] See P. Robinson, supra note 31, at 19-20; Shapiro, supra note 37, at 358-59.

[40] The determination of the exhaustion issue can be as burdensome as a determination of the merits. See P. Robinson, supra note 31, at 19.

The approach authorized by the proposed amendment to subsection (b) should generally not be considered unless a petition's lack of merit is clear at an early point in its consideration. If a petition's lack of merit is not clear at an early stage and state remedies have not been exhausted, spending further time to determine the merits -- as opposed to dismissing the petition and requiring the prisoner to exhaust state remedies -- may result in wasted effort.

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[41] *See* Shapiro, *supra* note 37, at 359 & n.202.

The decision whether to deny on the merits or to dismiss for failure to exhaust state remedies is left to the discretion of the district judge, having regard to the considerations and purposes set out in this analysis. What is called for is a practical judgment taking account of judicial economy and the policies underlying the requirement of exhaustion of state remedies.

B. Deference to Full and Fair State Adjudications

1. Relationship to Current Law

Proposed subsection (d) would change current law by requiring deference to the results of full and fair state adjudications. Under the rule of Townsend v. Sain, [42] deference is currently allowed only with respect to factual determinations by state courts. By contrast, a federal habeas corpus court is automatically required to re-determine legal and mixed legal-factual questions. [43] Proposed subsection (d) would eliminate this anomalous distinction.

The present unqualified requirement that federal courts re-adjudicate questions of law and mixed questions of law and fact that state courts have already resolved defies both common sense and sound judicial policy. [44] As a practical matter, the redundant adjudications required under current law seldom produce a different result than that obtained in state proceedings. [45] As Judge Friendly of the Second Circuit Court of Appeals has noted:

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[42] 372 U.S. 293 (1963).

[43] See id. at 318.

> My observation of the work of the excellent state courts of New York, Connecticut and Vermont does not suggest that federal determination of . . . [disputed factual issues and the application of recognized legal standards to ascertained facts] . . . is notably better [than a state court determination]. In the vast majority of cases we agree with the state courts, after a large expenditure of judges' and lawyers' time. In the few where we disagree, I feel no assurance that the federal determination is superior. When I am confident that the issue has received real attention and the state trial and appellate judges have been in accord among themselves, I see no sufficient reason to elevate my views over theirs in a close case. [46]

In a similar vein, Justice O'Connor has stated:

> If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independent, and viable. State courts will undoubtedly

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[44] See generally Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 444-62 (1963).

[45] See P. Robinson, supra note 31, at 14 (some relief obtained in 3.2% of all applications in sample studied and in 7% of all applications in sample decided on the merits).

[46] Friendly, supra note 35, at 165 n.125.

> continue in the future to litigate federal constitutional questions. State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions where a *full* and *fair* adjudication has been given in the state court. 47/

The historical origin of the current rule of mandatory re-determination confirms its arbitrary nature. Prior to the decision of *Brown v. Allen* [48] in 1953, a contrary rule prevailed under which a petitioner's contentions would not be re-examined by a federal habeas court if they had been fully and fairly adjudicated in state proceedings. [49] In *Ex Parte Hawk*, [50] for example, the Court stated:

> Where the state courts have considered and adjudicated the merits of . . . [a petitioner's] . . . contentions . . . a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated . . . . But where resort to state court remedies has failed to afford a full and fair

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47/ O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 William and Mary L. Rev. 801, 814-15 (1981).

48/ 344 U.S. 443 (1953).

49/ *See* Bator, *supra* note 44, at 463-65, 493-99.

50/ 321 U.S. 114 (1944).

> adjudication of the federal contentions raised, either because the state affords no remedy . . . or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate . . . a federal court should entertain his petition for habeas corpus, else he would be remediless. [51]

The current approach of re-examining questions of law and mixed questions of law and fact emerged abruptly in Justice Frankfurter's conclusory statement [52] in Brown v. Allen that deference to the state courts on non-factual issues is not allowed under the habeas corpus statute. [53] The statute, however, merely provides that custody in violation of the Constitution or laws of the United States is a ground on which federal habeas corpus may be sought. [54] There is nothing in the statute that determines the effect to be given to prior state adjudications. There is also nothing in the statute that affords any basis for distinguishing unlawful custody based on a mistaken factual determination from unlawful custody based on a mistaken view of federal law.

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[51] Id. at 118.

[52] See Bator, supra note 44, at 500-01.

[53] See 344 U.S. at 506-08.

[54] See 28 U.S.C. § 2241(c)(3).

Hence, the current approach to re-adjudication of matters previously adjudicated in state proceedings is unjustified in terms of both policy and legal precedent before Brown v. Allen. Proposed subsection (d) would accordingly repeal the rule requiring re-determination of non-factual issues by federal habeas courts where the state adjudication was full and fair.

2. The Meaning of "Full and Fair"

Proposed subsection (d) would require deference to the result of state adjudications that are "full and fair." The language of proposed subsection (d) ("full and fair") is the same as that used by the Supreme Court prior to Brown v. Allen when describing the appropriate scope of reexamination of claims previously adjudicated in state proceedings [55] and the same as that currently used in relation to re-determination of factual questions under Townsend v. Sain. [56] It is also essentially the same as the language employed in regard to habeas review of Fourth Amendment exclusionary rule claims under the rule of Stone v. Powell [57] and in regard to habeas review of court martial proceedings under the rule of Burns v. Wilson. [58]

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[55] See Ex Parte Hawk, 321 U.S. 114, 118 (1944).

[56] See 372 U.S. at 312-13.

[57] 428 U.S. 465, 494 (1976).

The requirement of a "full and fair" adjudication is intended to apply to the state process as a whole. Thus, a state proceeding that was incomplete or unfair would not warrant review of the merits by a federal habeas corpus court if the deficiency was cured or corrected at a later stage in state proceedings.

Under the rule of Townsend v. Sain, a federal habeas corpus court may defer to a state factual determination that was made after a full and fair hearing. The intended meaning of a "full and fair" state adjudication -- which applies to nonfactual as well as factual determinations -- has both significant affinities to and significant differences from the notion of a "full and fair" hearing specified by the six criteria set forth in Townsend. The so-called Townsend criteria accordingly serve as a useful reference point.

First, under proposed subsection (d), there would be no full and fair adjudication of an issue if it were not actually considered and decided on the merits in a state proceeding. This requirement is identical to the first Townsend criterion. [59]

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[58] 346 U.S. 137, 142, 144. See generally Strassburg, Civilian Judicial Review of Military Criminal Justice, 66 Mil. L. Rev. 1, 25-30, 54-55, 59-60 (1974); Developments in the Law -- Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1208-29 (1970).

Second, a state adjudication would not be full and fair if the determination arrived at did not meet a minimum standard of reasonableness. If a factual determination were such that no reasonable court could have reached such a conclusion from the evidence presented to the state court, this standard would not be satisfied. [60] Similarly, the disposition of the claim would have to be reasonable, in light of the facts found and the rule of law applied. Although the rule of law applied would have to reflect a reasonable view of federal law, a district judge could not properly override the state court determination of a legal issue simply because he would reach a different conclusion or because the federal circuit in which he sits might reach a different view. Thus, for example, if the federal circuits were divided on a question of federal law and the courts of a particular state adopted the view of one circuit rather than that of another, no ground would exist for a federal habeas corpus court to override such a decision.

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[59] See 372 U.S. at 313-14.

[60] This requirement can be compared to the second Townsend criterion, which states that a state hearing was not "full and fair" if the result reached was not "fairly supported by the record." See 372 U.S. at 316.

Third, to be full and fair, a state adjudication would have to be conducted in a manner consistent with the requirements of federal law. Ordinarily, a state adjudication could fail to satisfy this requirement in only two ways. First, the adjudication may be so cursory, biased or otherwise fundamentally unfair as to constitute a denial of constitutional due process. Second, the adjudication might fail to comply with some more specific procedural requirement of federal law. For example, under the rule of Jackson v. Denno, [61] a coerced confession claim must be determined by the judge in a hearing outside of the presence of the jury. If the required procedure were not followed, the state adjudication would not be "full and fair" in the intended sense.

This requirement would replace two unsatisfactory criteria set forth in Townsend. The third so-called Townsend criterion requires re-adjudication if the state procedure did not violate the Constitution but was "seriously inadequate for the ascertainment of truth." [62] The sixth Townsend criterion is an "open-ended" standard that requires re-adjudication whenever the state court has not "after a full hearing reliably found the relevant facts." [63/] These criteria, which incorporate undefined notions of "serious inadequacy," "fullness" and "reliability," provide no clear guidance to a federal habeas corpus court and hence invite subjective adjudication. Proposed subsection (d) substitutes the more definite standard of compliance with the procedural requirements of federal law.

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[61] 378 U.S. 368 (1964).

[62] See 372 U.S. at 316.

Fourth, re-adjudication would be warranted if there were new evidence bearing on the petitioner's claim which could not have been obtained through the exercise of reasonable diligence at the time of the state adjudication. The new evidence would have to be of substantial importance to the decision of the petitioner's claim. Similarly, a subsequent change of federal law of substantial importance to the decision of the petitioner's claim would warrant re-adjudication. [64/] This requirement is comparable to,

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[63/] See 372 U.S. at 317-18.

[64/] New evidence would be of "substantial importance" if the petitioner establishes a reasonable doubt that the disposition complained of would have come about had the evidence been produced in the state proceedings. Similarly, a change of law would be of substantial importance if it were retroactively applicable and there were a reasonable doubt that the disposition would have been the same had the changed law been applied in the state proceedings. Cf. text accompanying notes 4-5 supra (definition of "prejudice" in standard governing preclusive effect of procedural defaults).

but more definite and circumscribed than, the fourth and fifth Townsend criteria. [65]

In sum, a state adjudication would be full and fair in the sense of proposed subsection (d) if: (i) the claim at issue was actually considered and decided on the merits in state proceedings; (ii) the factual determination of the state court, the disposition resulting from its application of the law to the facts, and its view of the applicable rule of federal law were reasonable; (iii) the adjudication was consistent with the procedural requirements of federal law; and (iv) there is no new evidence of substantial importance which could not reasonably have been produced at the time of the state adjudication and no subsequent change of law of substantial importance has occurred.

3. Denial on the Merits Under Proposed Subsection (d)

Proposed subsection (d) states that a writ of habeas corpus "shall not be granted" with respect to a claim that was fully and fairly adjudicated in state proceedings. The proposed subsection would not prohibit denial of a petition on the merits in such circumstances.

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[65] See 372 U.S. at 317.

This distinction reflects considerations of judicial economy, and is similar to the distinction drawn in proposed subsection (b) between granting and denying relief in cases where state remedies have not been exhausted. [66] In some instances, it will appear at an early stage in a petition's consideration that it is without merit. Requiring that the adequacy of the state adjudication be decided as a threshold issue in such cases would be wasteful. Whether or not the state process was found to be adequate, denial of the relief requested by the petitioner would be a foregone conclusion. Moreover, if the petition were denied after limited effort had been expended on it, little or no harm would have been done to the interest in finality of state judgments and the policy of avoiding duplicative litigation of matters that have already been decided in fair adjudications.

Hence, when a petition's lack of merit is clear at an early point, denial of the petition based on its lack of merit, without any decision concerning the adequacy of the state process, would be within the range of discretion contemplated by proposed subsection (d). But the granting of relief would not be allowed unless the petitioner established that the state adjudication was not full and fair.

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[66] *See generally* section VI.A *supra*.

C. The Presumed Correctness of State Fact-Finding

Proposed subsection (e) would simplify current subsection (d), which is verbose, confusing and obscure, and bring its formulation into conformity with that of proposed subsection (d). Proposed subsection (e) would provide specifically that a state court's full and fair determination of a factual issue is presumed to be correct. The presumption could be rebutted by clear and convincing evidence. "Full and fair" would have the same meaning here as it would in proposed subsection (d).

The impact of proposed subsection (e) would be a minor one, since under proposed subsection (d) the results of a full and fair state adjudication could not be overturned. However, there are certain narrow situations in which proposed subsection (e) would apply. Under the standard of proposed subsection (d), both the nonfactual and factual aspects of the petitioner's claims would have to be fully and fairly adjudicated. If, for example, the rule of law applied by a state court in deciding a petitioner's claim reflected an unreasonable view of federal law, the state adjudication would not be considered full and fair. The claim would accordingly be open to reexamination by the federal habeas court. Notwithstanding the unreasonableness of the legal determination, there might be no proof that the treatment of the factual issues raised by the claim had not been full and fair. Proposed subsection (e) would create a presumption of correctness of the state court's factual findings in such a case, rebuttable by clear and convincing evidence.

VII. SECTION 6 OF THE BILL -- PROPOSED AMENDMENTS TO 28 U.S.C. § 2255 RELATING TO APPEAL, PROCEDURAL DEFAULTS, AND THE TIME FOR MAKING § 2255 MOTIONS

Section 6 of the bill would amend 28 U.S.C. § 2255. The justifications for the amendments are essentially the same as those for the corresponding changes in habeas corpus procedures effected by the earlier sections.

The deletion of the penultimate paragraph of 28 U.S.C. § 2255 is incidental to the amendment of 28 U.S.C. § 2253 effected by section 3 of the bill. Since appeal in § 2255 motion proceedings would be addressed explicitly in amended § 2253, there would be no need for a statement in § 2255 that an appeal in proceedings pursuant to that section is to be as from a final judgment on application for a writ of habeas corpus.

The first paragraph that would be added at the end of § 2255 by section 6 of the bill would clarify that the cause and prejudice standard also applies to procedural defaults in federal criminal adjudications. [67] The express definition of cause and the intended definition of prejudice are the same as in the case of state procedural defaults. [68]

The second paragraph that would be added by section 6 of the bill creates a limitation period that normally runs from finality of the judgment, that is, from the time remedies on direct review are exhausted or the time for seeking direct review has expired. [69] The limitation period is two years rather than one year since the time afforded to the defendant is not in addition to whatever time may be allowed by state law to pursue state collateral remedies, as is the case with habeas corpus applications under the amendments of section 2 of the bill, but starts immediately when the judgment becomes final.

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[67] See generally Goodman & Sallett, supra note 5, at 1692-93.

[68] See section III.A.1 supra.

[69] Section 2255 provides that a federal prisoner may apply for a writ of habeas corpus if the motion remedy of that section "is inadequate or ineffective to test the legality of his detention." In the context of the proposed amendments to § 2255, the fact that the limitation period has expired should not be taken as making the motion remedy "inadequate or ineffective." A contrary interpretation would make habeas corpus freely available to federal prisoners two years after finality, defeating the purpose of the limitation period.

United States Department of Justice
Washington, D.C. 20530

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

16 APR 1982

Memorandum for Jonathan C. Rose
Assistant Attorney General
Office of Legal Policy

Re: Validity of Administration's Habeas Corpus Proposals under Suspension Clause

You have requested the opinion of this Office with regard to whether the Administration's legislative proposals for reform of federal habeas corpus would be valid under the Suspension Clause of the Constitution, Art. 1, § 9, cl. 2. For the reasons set forth below, we conclude that these proposals would not violate the Suspension Clause.

I. The Administration Proposals

The Administration has proposed a comprehensive reform of federal habeas corpus and related procedures entitled the "Habeas Corpus Reform Act of 1982." This legislation would ordinarily bar consideration by a federal habeas corpus court of a claim that has not been properly raised in state proceedings where the state has provided an opportunity to raise the claim that is consistent with the requirements of federal law. The amendment would establish a one-year limitation period, normally commencing at the time when state remedies are exhausted, for application for federal habeas corpus, and a corresponding limitation period for the filing of motions under 28 U.S.C. § 2255, the statute governing applications for collateral relief by federal prisoners. The Administration proposal would also require deference to state determinations of factual and legal matters that have been "fully and fairly" adjudicated in the state proceedings.

1/ The Administration's proposal has been introduced in the Senate as S. 2216 and referred to the Senate Committee on the Judiciary.

II. Validity of the Administration Proposals under the Suspension Clause

It is our opinion that the Administration bill does not "suspend" the writ of habeas corpus in violation of Art. 1, § 9, cl. 2 of the Constitution. The Suspension Clause provides:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the Public Safety may require it."

The most significant authority for interpreting the Suspension Clause is Swain v. Pressley, 430 U.S. 372 (1977). 2/ Swain was a challenge to a federal statute which eliminated federal habeas corpus jurisdiction in the District of Columbia but provided a collateral review procedure in the local court system. The respondent contended that this statute "suspended" the privilege of the writ because the judges of the local court system did not enjoy the tenure and salary protections of Article III of the Constitution.

The Supreme Court concluded that the statute in question did not violate the Suspension Clause. Concurring in the result, the Chief Justice, joined by Justices Blackmun and Rehnquist, argued that "[t]he sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted." 430 U.S. at 385. After reviewing the scope of the writ at common law, the Chief Justice concluded that the Suspension Clause does not require Congress "to provide a federal remedy for collateral review of a conviction entered by a court of competent jurisdiction." Id.

2/ The proceedings and debates at the Constitutional Convention do not explain the meaning of the Clause. See 2 M. Farrand, The Records of the Federal Convention of 1787 (1966 ed.) 334, 438. Cases decided prior to Swain v. Pressley shed little additional light on the Clause.

The Supreme Court recently issued three decisions interpreting the scope of federal habeas corpus and related collateral review procedures. Rose v. Lundy, 50 U.S.L.W. 4272 (Mar. 3, 1982); United States v. Frady, No. 80-1595 (April 5, 1982); and Engle v. Isaac, No. 80-1430 (April 5, 1982). These cases involved matters of statutory interpretation only and did not address the scope of the Suspension Clause.

The majority of the Court, per Justice Stevens, 3/ concluded that there was no suspension of the privilege because the collateral review procedure in the local court was an effective and adequate substitute for the federal habeas corpus action, notwithstanding the fact that the local court judges lacked the tenure and salary protections of Article III. Justice Stevens discussed the Chief Justice's opinion in the following footnote.

> "The Chief Justice's concurring opinion reminds us that Congress has broadened the scope of the writ of habeas corpus beyond the limits that obtained during the 17th and 18th centuries; he cites us to the article in which Judge Friendly observed that "[w]hat Congress has given, Congress can partially take away." Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 171 (1970)(emphasis added). That observation is more cautious than the conclusion that Congress may totally repeal all post-18th century developments in this area of the law. In any event, in view of the narrow basis for our decision, we have no occasion to address the broad issue discussed by the Chief Justice."

410 U.S. at 380 n.13 (emphasis in original).

This footnote might suggest that the Suspension Clause may not be defined solely with reference to the scope of the writ at common law, but may incorporate certain post-1787 developments in habeas corpus. The Court, however, expressly declined to address this issue, and three Justices approved the pure historical approach to the Suspension Clause. We believe that the better view is that the Suspension Clause is defined with reference to the writ as it existed in 1787.

If so, it is evident that Congress could wholly abolish the writ of habeas corpus insofar as it extends to persons held under state law. The first Judiciary Act, which is accorded considerable weight in constitutional interpretation

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3/ Justice Stevens was joined by Justices Brennan, Stewart, White, and Marshall. Justice Powell concurred separately in the result.

because it was enacted by the first Congress, many of whose members had participated in the Constitutional Convention, empowered the Supreme Court and the lower federal courts to issue writs of habeas corpus, but provided that such writs "shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States." It was early established that the jurisdiction of the federal courts to issue the writ is not inherent but must be conferred by statute. Ex parte Bollman, 8 U.S (4 Cranch) 75 (1807). And Ex parte Dorr, 44 U.S. (3 How.) 103 (1845), held that, in consequence, the proviso of the Judiciary Act limiting the writ to federal prisoners denied federal courts the power to issue the writ to one held under state law. The writ was not expanded to reach persons held under state law until 1867. Act of February 5, 1867, 14 Stat. 385.

If Congress can wholly abolish the writ of habeas corpus as it applies to federal court collateral review of state convictions, it necessarily can limit the scope of the writ in such cases without wholly abolishing it. We conclude, therefore, that the Administration bill does not suspend the privilege of the writ of habeas corpus, in violation of Art. 1, § 9, cl. 2, insofar as it limits the scope of the remedy available under 28 U.S.C. § 2254. 4/

Somewhat different problems are presented by the Administration bill's limitations on collateral review of federal convictions under 28 U.S.C. § 2255. The first Judiciary Act did authorize Justices of the Supreme Court and judges of inferior federal courts to grant writs of habeas corpus to federal prisoners for the purpose of inquiring into the cause of their commitment. 1 Stat. 82. Thus, there is substantial support for the proposition that the Suspension Clause places some limits on the power of the federal government to suspend the writ as it applies to federal court collateral review of petitions by persons held under federal law.

Whatever those limits may be, however, we believe they are not violated by the Administration bill. Section 2255 is not, technically, a habeas corpus remedy. Rather, it is

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4/ We find additional support for this conclusion in the fact that most (and possibly all) states now provide convicted prisoners with collateral review procedures. To the extent that a particular state provides an adequate and effective collateral review mechanism, denial of federal habeas corpus should be sustained even under the narrow reasoning of the majority opinion in Swain.

a procedure in the nature of the writ of error coram nobis. Section 2255 was intended to be the exact equivalent of the pre-existing habeas remedy except that review is in the sentencing court rather than the court in the district in which the prisoner is confined. *Hill* v. *United States*, 368 U.S. 424, 427 (1962); *United States* v. *Hayman*, 342 U.S. 205, 219 (1952). Section 2255 provides that ordinarily

> "[a]n application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief . . . ."

The section goes on to state, however, that habeas corpus will be available if it appears that "the [§ 2255] remedy by motion is inadequate or ineffective to test the legality of [the petitioner's] detention." Thus, habeas corpus will remain available under the Administration bill in the unlikely event that the § 2255 remedy is found to be inadequate or ineffective. It is therefore our opinion that under *Swain* v. *Pressley*, *supra*, the Administration bill would not suspend the privilege of the writ.

Moreover, we believe that the restrictions on § 2255 relief contained in the Administration bill would not violate the Suspension Clause even if a supplementary habeas remedy were not available. Section 6 of the bill simply codifies the "cause" and "prejudice" standard already adopted for § 2255 cases by the Supreme Court in *Davis* v. *United States*, 421 U.S. 233 (1973). Section 6 also provides for a 2-year limitation period (with exceptions) for § 2255 claims. These relatively minor restrictions on the § 2255 remedy do not alter the scope of the writ as it existed at common law and, therefore, do not amount to a "suspension" of the privilege of the writ in violation of the Suspension Clause.

We conclude, therefore, that the Administration bill is fully consistent with the requirements of the Suspension Clause.

Theodore B Olson
Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Senator **Heflin**. We next have a panel of Prof. Stephen Gillers and Ms. Phylis Bamberger. Professor Gillers is associate professor of law at New York University, and appears on behalf of the American Civil Liberties Union. Ms. Bamberger appears on behalf of the Legal Aid Society of New York and the Legal Aid Defender Association of Washington, D.C.

Ms. **Bamberger**. As well as the Federal defenders throughout the country.

STATEMENT OF A PANEL CONSISTING OF STEPHEN GILLERS, ASSOCIATE PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION, AND PHYLIS SKLOOT BAMBERGER, ATTORNEY IN CHARGE, APPEALS DIVISION, FEDERAL DEFENDER SERVICES UNIT, LEGAL AID SOCIETY OF NEW YORK, ON BEHALF OF THE LEGAL AID SOCIETY OF NEW YORK CITY, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AND FEDERAL DEFENDERS

Professor **Gillers**. Good morning, Mr. Chairman. Thank you for this opportunity to speak. We did have an opportunity to speak to S. 653 as well, and this bill would change the earlier bill in certain fundamental ways, as Mr. Rose and Senator Chiles indicated.

Senator, we find certain portions of this bill to be sensible and deserving of implementation. We find much of it, however, to be unfair, uninformed and unfocused. In saying that, I want to emphasize that we sympathize with and understand the administration's concern for finality, for federalism and for the workload of the Federal courts. But we do not think this bill, in the main, will accomplish its goals.

APPROVED PROVISIONS

Two provisions which we do believe should be adopted are the following. There is a proposed amendment to 2254(b) which would allow a Federal judge to deny, on the merits, a habeas petition if it was clear that the petition was without merit, without having to return the prisoner to the State courts to exhaust remedies.

I think this is salutary and could support it, so long as it was also clear in the bill that the Federal judge could only make that decision if, taking the facts in the light most favorable to the prisoner and all reasonable inferences from them, it could be said as a matter of law that the prisoner was not entitled to relief on his legal claim. If that were so—and this is a standard that appears often in the law—I would have no problem with implementation of that subsection.

Furthermore, I believe that the new section 2254(e), which replaces a labyrinthian and, to my mind, incomprehensible 2254(d) with regard to when a Federal court should or should not have a hearing, is also salutary. Unlike Senator Chiles I do not read the proposed 2254(e) as necessarily requiring a hearing so that a prisoner will always have a chance to show by clear and convincing evidence that the facts were ill-founded in the State court. If there is any ambiguity in that regard, I believe it can be clarified and made to comport with the current standard regarding the right to a hearing.

I want to speak in the balance of my statement to three other portions of the bill which we believe are unwise. They are the limitation on the definition of cause; the statute of limitations period, as written, which would apply to Federal and State prisoners; and, finally, the substantial overruling of *Brown* v. *Allen*.

DEFINITION OF CAUSE

With regard to the cause issue, Senator Heflin, the bill, as you have heard, would leave the meaning of prejudice, taken from Wainwright, basically undefined, and provide a definition of cause in three subsections.

We believe that the words "prejudice" and "cause" are two sides of a coin; that is, one might tolerate less prejudice if the cause were clearer and if the cause were not immediately apparent, one might insist on greater prejudice.

We think it would be unwise, given the formative stage of the Wainwright and Sykes regime, now to fix the definition of cause for all time. We think that this can raise serious constitutional problems with regard to the suspension clause of the Constitution.

And we think, Senator, that six justices in Wainwright, when they decided that they would not define cause, specifically in order to prevent tying their hands in the event of future miscarriages of justice, were right in their decision. Justice Stevens, concurring in Wainwright, emphasized that point.

In fact, Senator, the proposed law reveals two examples of the danger in its own text. For example, in 2254(d)(1), it is assumed that constitutionally incompetent counsel would amount to State action which would equal cause. But the Supreme Court this year, in the *Polk County* case, said that the conduct of appointed counsel, and therefore retained counsel, does not constitute State action under § 1983 of title 42.

Furthermore, 2244(d)(2) recognizes cause when a Federal right was not recognized prior to the procedural default. Again, the question is, recognized where? Is a decision of a district court in Washington State to be recognized in a trial in Florida? Are all attorneys on constant notice of everything that appears or, for that matter, does not appear in the advance sheets from any court in the land, Federal or, for that matter, State?

STATUTE OF LIMITATIONS

We also find the limitations provision of § 2244 unacceptable as drafted. The Laches provision, which is only 5 years old, in section 9(a), really has not had a chance to prove itself. We would ride with that one for a while until we can demonstrate that it has or has not been ineffective.

That aside, we think 1 year is simply too short. It is true that the prisoner will have exhausted his habeas remedies and his collateral remedies in State court, but I find the administration's argument that therefore he will know exactly what his Federal claims are and can quickly file them within a year, facile.

The procedure is different; Federal jurisdiction is different. Lawyers, let alone pro se prisoners, have difficulty with Federal procedure and jurisdiction. I believe that the 1-year period is too short a time.

The limitations period promotes duplication of filings of petitions—something that the court, in *Rose* v. *Lundy,* decided last month is frowned upon. It does it in this way: if a prisoner has a claim on which the statute is running and one on which it has not yet started to run because it is still in the State process, he must file the claim on which the statute is running to protect himself even though he is not ready to file the other claim. Later, if he loses on that first filing, he will want to file the second and will either be faced with the claim that he is filing successive petitions, or successive petitions will be allowed.

So, we think that a firm statute of limitations will encourage duplication.

We do not see how the language of 2244(e) would fairly allow a prisoner to cite, and get into court in the event of, prosecutorial misconduct. Let me explain what I mean. If the prosecutor has acted wrongfully, the prisoner is still under a reasonable duty to discover that wrongful conduct.

We do not think a prisoner should have that obligation if a prosecutor, for example, has concealed exculpatory information. When it comes out, the prisoner should have a right to go to Federal court at that time. The prosecutor should not be heard to say, "You should have discovered my misconduct earlier."

Again, 2244(e) has a problem with the phrase "initially recognized." Initially recognized where and by whom? Mr. Rose intimated that he meant by the Supreme Court retroactively; the section does not say that.

There is no provision for tolling in the event of insanity or disability of the prisoner.

If a prisoner filed a day late or a day beyond the limitations period, and his claim was that the statute is or has been declared unconstitutional—"the statute under which I was convicted is or has been declared unconstitutional"—he would be out of Federal court. He would be remanded to incarceration even under a statute that may be or may earlier have been declared unconstitutional.

We see no State interest in keeping a prisoner in jail if the statute under which he was convicted is or was subsequently declared, in another case, unconstitutional, even if he is out of time.

Finally, our problem with the limitations period arises because there is no catchall which would allow Federal review in the event of manifest injustice.

BROWN *v.* ALLEN

I want to address the *Brown* v. *Allen* problem. I will be brief on this one. We know, Senator, since as long ago as 1821 when the Supreme Court decided *Cohens* v. *Virginia,* that when there is a Federal question in litigation—and that includes a criminal litigation—there is Article III jurisdiction to review it in the Supreme Court. If State courts do not like second-guessing by Federal courts, the fact is that for 160 years, we have recognized that power to second-guess in the Supreme Court.

Senator, the Supreme Court had 5,000 cases on its docket last year; 2,371 of them were in forma pauperis cases. Most of those, the large majority, were prisoner cases. What *Brown* v. *Allen* did, Senator, was redirect traffic from Federal review in the Supreme Court to Federal review by the 600 or so district judges.

Now, who is in a better position to review the 7,000 or so habeas filings each year, 600 district judges or 9 justices? The effect of a redirection of traffic back again, which this bill would cause, will be an increase in the number of certiorari petitions. Yet, we know that the Supreme Court cannot intelligently consider even those it now receives. It seems to me, then, that it is cynical, at best, to say, "You have a right to Federal review in the Supreme Court, but we are going to structure it so that it is impossible for you to get it, except in theory."

Furthermore, the proposed overruling of *Brown* v. *Allen* will not reduce the workload. There are still questions that the district courts and magistrates will have to consider and that the State attorneys general will have to address, even under the proposed law.

The question will be different. Was the hearing in State court full and fair, as opposed to was it accurate as a matter of law? But the question will still have to be answered. We are not closing the door entirely; we are just changing the nature of the review, so the workload will not change.

Will federalism concerns be better served? I do not think so. Federal judges will still make assessments and review the work of State judges. It might be argued that overruling of State judge decisions will occur less frequently. But, Senator, the success rate for State habeas petitioners is abysmally low—minuscule. I cannot believe that the federalism interests will be significantly served by changing the question and making the success rate more minuscule.

FIVE ALTERNATIVES

Senator, let me, in closing, suggest five alternative, overlapping ways in which the serious questions in this area can be addressed.

First, denial on the merits, despite nonexhaustion, is acceptable under the circumstances I outlined earlier. Second, a statute of limitations provision, properly drafted and which provide for an exception in the case of manifest injustice, could be acceptable, if the period of time were appropriate and it met the other objections stressed earlier.

Third, it is noteworthy that more than half of the petitions filed are dismissed for failure to exhaust. We could cut those 7,000 in half if we had better lines of communication to the people filing the petition—the pro se petitioners. Why not cheaply make some kind informative pamphlet or booklet available to State prisoners who write away for the habeas corpus form, explaining in detail that they must exhaust their State remedies first on every question they are going to raise, and if they do not, it will be dismissed summarily?

Next, we believe that rule 9(b) dealing with successive petitions can be amended and toughened so that people who now file their claims sequentially in order to take advantage of the open-ended nature of the writ will be discouraged from doing so. I will not go into the particular language here, but we think 9(b) can be strengthened to provide for that above.

And, finally, and perhaps most important, the single most frequently cited complaint in habeas petitions is ineffective assistance of counsel. We believe that Congress ought to investigate ways of improving the quality of trial counsel, especially assigned trial counsel, in State cases.

It is no secret to people familiar with State trials that the quality of assigned trial counsel is often extremely poor. Congress has it within its authority and power to investigate and implement ways of improving that quality, and we think if it does, the number of petitions will also decline.

Thank you very much.

[The prepared statement follows:]

STATEMENT OF STEPHEN GILLERS
on behalf of the
AMERICAN CIVIL LIBERTIES UNION

I. INTRODUCTION AND SUMMARY

I am a law professor at New York University School of Law and a member of the New York Bar. I have taught in the areas of constitutional law, evidence, and federal jurisdiction and have written on criminal law matters. I am testifying here today on behalf of the American Civil Liberties Union.

S. 2216 should not be enacted. Before I explain the reasons for this conclusion, I would like to emphasize two reasons upon which we do not place primary reliance. Although S. 2216 may in certain regards be constitutionally suspect, that is not our main reason for opposing it. We recognize the existence of authority that the bill's essential purpose, to regulate the scope of federal court jurisdiction over state and federal habeas corpus petitions, is to a significant degree within Congress's power.[1]

Nor do we oppose S. 2216 because we reject its apparent goals -- namely, to recognize the state and federal interest in finality in the determination of criminal cases, to control the quantity of federal judicial (and other) resources spent on habeas petitions, to promote federalism, and to support the legitimate wish to assure compliance with reasonable state and federal procedural rules in state criminal trials and appeals. While we might weigh these goals differently as against the interests of state and federal prisoners with allegations of federal rights denial, we also acknowledge the validity of the goals and agree that determination of the scope of federal jurisdiction over state and federal habeas claims may properly consider them.

Why then do we oppose the bill? There are several reasons.

First, it has become apparent to the Supreme Court, and to scholars writing in the area, that wherever else they may disagree on how the balance ought to be struck in particular cases or classes of cases, federal jurisdiction over state (and federal) habeas petitions (where there has been a procedural default) must be defined with flexible rules, which grant power but permit discretion in its exercise,[2] and not with categorical rules flatly denying power. The latter, though arguably easier of application, will predictably result in great injustice and force unneeded constitutional confrontations. In the 29 years since Brown v. Allen,[3] the case that introduced the modern era of federal habeas jurisdiction over state prisoner claims, the justices and commentators have recognized the importance of flexible rules in this area and the Supreme Court has instituted them. S. 2216 would undo this history and deny its lessons.

It would do this at a time when we still do not know the full effect of the landmark case of Wainwright v. Sykes,[4] decided only five years ago, on the number and nature of state habeas filings. Notably, the Court's opinion in Wainwright, written by Justice Rehnquist for a six justice majority, intentionally left vague the "precise content" of the "cause and prejudice" test[5] there applied to all state petitions containing a procedural default under state law. Concurring in the majority opinion, Justice Stevens said he believed the Court "wisely refrained from attempting to give precise content" to the test.[6] S. 2216 would now undermine the Court's intention by freezing the definition of the "cause" half of the test.

Our second objection to the bill is based on our conclusions that it will not achieve the purposes it was apparently intended to accomplish. It represents a blind and heavy interference in an area that needs delicate, gradual finetuning. Available statistics, which we cite below, convince us that the bill would not be effective. We believe this may be because those who would reform the area of federal habeas jurisdiction are not fully aware of the nature of the cases that are filed, or their real demand on federal and state resources. Facile references to the number of state habeas filings "clogging our dockets" miss the point. Cases must be weighed according to the amount of time and attention they demand of the court system and respondents. Obviously, an antitrust case that takes three years and a four month jury trial is different from a breach of contract case that is disposed of within three months of filing on a motion to dismiss. Both are "one case," but to say that and only that seriously obscures the differences between them. Furthermore, it is incorrectly assumed that if we close the federal court door to state habeas petitioners a few inches more, appreciable numbers of cases that might otherwise be filed will not be. There is no basis for this conclusion, as we discuss below.

Our third main reason for opposing the bill, of equal or greater seriousness than the other two, is that its categorical rules denying power may lead to a serious miscarriage of justice. That is always the risk of categorical rules, and no less so here. Indeed, the Wainwright court, when it announced but did not define the "cause and prejudice" test, said that the new test would not prevent "a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice."[7] A flexible and discretionary standard permits this result. A categorical rule blanketly denying power may not. We cannot know. The result, under the latter rule, is that the Court must either permit the miscarriage of justice to go uncorrected, or it must stretch the meaning of the statute beyond the original intent, or it must declare the statute unconstitutional. This trilemma is entirely and properly avoided with the "common law" discretionary development Wainwright envisions.

Our fourth reason for opposing the bill is that it would largely overrule Brown v. Allen and require a federal habeas court to accept the legal determination of a state court on a federal constitutional issue so long as the state court's conclusion was "fully and fairly adjudicated." Brown v. Allen has become an integral and important part of our law, routinely accepted by unanimous Supreme Courts for decades. The test that the bill would substitute for the holding of Brown v. Allen will inject new confusion into a settled area and not, we believe, achieve its commendable objective of giving greater deference to state judicial determinations.

Our fifth reason for opposing the bill is that some of its language is vague or otherwise inartful and therefore capable of no clear interpretation.

Before proceeding to a fuller discussion, we should add, on a positive note, that there are certain provisions of the bill we find salutary. We will refer to these. Finally, we recognize the large amount of work that the Justice Department has put into making sense and creating order in an area of law which, for long stretches of time, has seemed to lack both. We also appreciate the Department's understandable desire to put controls on a category of cases which, at times, has seemed capable of endless growth. In short, we do not belittle the motives or interests of the Administration in its attempt to rationalize this area. But, with a few exceptions, we believe the bill would not accomplish its end of rationalization but would, through its use of categorical rules, instead lead to fundamental unfairness.

In the balance of this testimony we will define the nature of the problem, including the parts of the problem at which the bill aims (Part II), provide a brief case history of rulings in this area (Part III), analyze what the bill would do and the value of its proposals (Part IV), and discuss the statistical evidence arguing against enactment (Part V).

II. THE NATURE OF THE PROBLEM

Complicated as this area is made by the delicate nature of our federal system, the essential problem can be simply stated. Some people, including some innocent people, are convicted at state trials through the use of procedures that violate their rights under the United States Constitution. If the state's appellate and collateral review systems do not vindicate their rights, either because the state court ruled erroneously on their federal claims or because the claims were not presented to the state court, what shall be the defendant's remedy in the federal courts other than through direct review in the Supreme Court?

Of course, if we were sufficiently wise so that we could make rules that would open the federal court's habeas door to meritorious state claims and those only, we would wholly solve our problem. But wisdom does not offer this escape and never will. Once the door is open, the good cases and the bad will enter. This leads to the issue which concerned both Justice Frankfurter and Justice Jackson in Brown v. Allen, though from different perspectives.

> The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by undiscriminating generalities. The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others.
>
> (Frankfurter, J.)[8]

> It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.
>
> (Jackson, J.)[9]

The problem has persisted across the next three decades. We can only approximate an answer to it, unless we want to move to one of the extremes -- close the federal habeas door entirely, assuming the Constitution would permit it, or leave it permanently and wide open. No one has suggested either answer. Each would produce enormous unfairness or disruption or both. But where then do we compromise? And how? Using Justice Jackson's image, we don't want to make the needles, the meritorious claims, impossible to find among the hay, the meritless ones, but by excluding the latter we want to be careful not to exclude the former as well. And we want to do all this while (a) remaining attentive to the state and societal interest in finality, (b) protecting the integrity of reasonable procedural rules, and (c) respecting federalist principles.

III. A BRIEF HISTORY[10]

In Brown v. Allen,[11] the Supreme Court held that a state prisoner may seek federal habeas relief even though he did not first seek direct review of his claim in the United States Supreme Court and even though his claim had been fully considered and rejected by the state courts. In Fay v. Noia,[12] the Court upheld the power of a federal habeas court to consider the claim of a state prisoner who had failed to raise his claim in state court, as required by a reasonable state procedural rule. So long as the failure was not deliberate, the federal claim would not be considered waived. This result was reached even though the Court recognized that a state procedural default would prevent it from considering the federal claim on direct review. Although Fay has been limited in subsequent cases, it has not been overruled and probably remains applicable where, as in Fay, the default was a non-delegable decision of the defendant. In Fay, the state defendant refrained from taking an appeal (a decision he could not delegate to counsel) because of the risk of a death penalty in the event of reversal and reconviction.[13] In Wainwright, Chief Justice Burger and Justice Stevens both believed that the "deliberate bypass" standard in Fay would continue to apply to certain non-delegable decisions of a defendant.[14]

The Wainwright "cause and prejudice" test was foreshadowed in Davis v. United States[15] and Francis v. Henderson,[16] each of which used a collateral attack to challenge, for the first time, the composition of grand juries. Unlike Fay, Wainwright asked under what circumstances a federal habeas court might overlook a state procedural default, for which counsel, not the defendant, was responsible, and exercise its discretion to assume jurisdiction. The effect (and intention) of Wainwright's use of a purposely undefined standard is that federal judges will be able to correct occasional "miscarriages of justice" (if they result from a violation of federal right) and at the same time dismiss those cases in which the procedural default ought not to be excused.[17]

Several other cases deserve mention in this brief history, although they raise different problems of habeas jurisdiction. Townsend v. Sain[18] in 1963 articulated standards a federal judge should apply in determining whether to hold a factual hearing on a state prisoner's claim of constitutional rights violation, where a hearing has already been held and facts found in state court. In 1966, Congress amended §2254(d) to provide statutory guidance on the same subject.

In Stone v. Powell,[19] the Supreme Court limited Brown v. Allen when it decided that federal habeas courts ought not review a state prisoner's claim of unlawful search and seizure if the petitioner had had a full and fair opportunity to raise the claim in state court. It was thought for a time that the Stone v. Powell rationale would apply to all claims that did not affect the accuracy of the determination of guilt. But in 1979, the Court rejected that notion when, in Rose v. Mitchell,[20] it held that a convicted state defendant could challenge racial discrimination in selection of the foreman of the grand jury that indicted him even though the defendant had a full and fair opportunity to raise the same claim in the state courts. Rose and Stone reveal the Court to be quite conscious of a discretionary power to limit habeas jurisdiction and a selective willingness to use it.

Finally, just last year in Sumner v. Mata,[21] the Court reviewed a case from the Ninth Circuit granting habeas relief to a state prisoner on the ground that a photographic identification procedure had violated his Fourteenth Amendment rights. An intermediate California appellate court had earlier rejected the same claim. The Supreme Court held that the presumption of correctness in §2254(d) applied to state appellate court conclusions and that a federal habeas court was required to give in its opinion its reasons for rejecting these. Since the Circuit Court had not done this, the case was remanded. In a *per curiam* opinion on rehearing after remand, the Supreme Court last week again remanded the case to the Ninth Circuit after concluding that the lower court had "apparently misunderstood" the terms of the earlier remand. The exact nature of the misunderstanding is not pertinent to this testimony, but another holding is. In its *per curiam* opinion the Court made clear that the presumption of correctness that a federal habeas court was required to give to a state court's findings applied to its fact findings only and not to "the ultimate question as to the constitutionality of the pretrial identification procedures." The Administration's bill would reverse this week-old, *per curiam* unanimous Supreme Court view.

IV. S. 2216: WHAT WOULD IT DO?

I wish to concentrate on three provisions of S. 2216 and on the first of these even more than on the other two. Let me describe them here.

First, the bill would amend 28 U.S.C. §2244 by adding a new subsection (d) which, among other things, would prohibit a federal habeas court from considering any federal claim if that claim was not raised "in State proceedings at the time or in the manner required by State rules of procedure." In other words, the bill first attempts to define what I have called a procedural default, and then it withdraws federal jurisdiction if there was one. But there is an exception. Using Wainwright's language, the bill creates a way around this withdrawal if "actual prejudice resulted to the applicant" and if in addition there was cause for the procedural default. Although the word "cause" is not used in the bill, it is defined in three subparagraphs. The bill, in other words, would freeze the meaning of "cause" and make its absence jurisdictional. The bill's "cause and prejudice" test is intended both to limit Wainwright and overrule Fay, where Fay still applies.[22]

Second, the bill would add a new subsection (e) to §2244. This subsection would require that a habeas petition be filed within one year from the latest of four possible occurances. They are (1) "the time at which State remedies are exhausted"; (2) where the applicant was prevented from filing a petition because of State action, the time that the State action is removed; (3) "the time at which the Federal right asserted was initially recognized"; or (4) "the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence."

Third, even if the federal court was without jurisdiction to grant a writ for failure to exhaust state remedies, the bill would authorize the court to deny the writ "on the merits."

Fourth, as stated above, the bill would forbid a state court to grant a writ of habeas corpus "with respect to any claim that has been fully and fairly adjudicated in State proceedings."

Finally, the bill would substitute the following paragraph for the current language of §2254(d), which codifies Townsend v. Sain.

> "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a full and fair determination of a factual issue made in the case by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting this presumption by clear and convincing evidence."

There are other changes we do not here address. Furthermore, as stated earlier, the statute of limitations and "cause and prejudice" sections of the bill are paralleled, in its final section, with regard to federal prisoners seeking relief under 28 U.S.C. §2255. Our comments with regard to those provisions as they apply to state prisoners are equally applicable to federal inmates.

I consider new subsection 2244(d) first and at some length because I believe it is seriously misguided whatever one's view of the area. As I said earlier, this addition would freeze the meaning of "cause" when the Supreme Court has stated its considered conclusion that it would be most salutary to leave the word undefined in order to protect against true "miscarriages of justice." Why then should Congress charge into the breach? The Court has had no time to develop Wainwright. The lower courts[23] and commentators[24] have only just begun to develop, in a common law way, the proper meaning of "cause and prejudice." One of the more perceptive law review articles on the subject, by Professor Hill at Columbia Law School,[25] makes a cogent argument that the concept of "cause" and the concept of "prejudice" are overlapping, that the first at times subsumes aspects of the second. In this posture, it makes no sense to stunt a new equation, the culmination of three decades of judicial and scholarly analysis, with a fixed and narrow definition of one of its terms.

Furthermore, the bill's restrictive definition of "cause" could well result in extreme injustice. Take this case. After conviction, but before a notice of appeal is filed, the defendant's lawyer suffers a stroke, the notice is not timely filed and the state, under its rules, considers that failure jurisdictional. Read literally, which I assume is the way it is intended to be read, the bill would foreclose federal habeas relief no matter how compelling and how guilt-related the petitioner's claim may be. Or assume through oversight that the defense lawyer in a capital case files the notice of appeal a day late.[26] The defendant has a claim of error that goes to the very heart of his guilt or innocence. The bill as written would forbid federal habeas review. There would be no jurisdiction to hear the matter. Finally, assume the defendant's lawyer makes a grievious error amounting to incompetence, certainly not tactical, and which casts doubts on the defendant's guilt. One example is counsel's unawareness of a state defined affirmative defense which, if proved, as the record discloses it could have been, would reduce the seriousness of the offense. The proposed §2244(d) envisions no recourse in federal court, again by denying jurisdiction.

With regard to these hypotheticals, the current "cause and prejudice" test would permit a federal judge, as a matter of discretion, to find each and to hear the claimed denial of federal right. On the other hand, if the bypass was not inadvertent or if the lost opportunity to present the claim was not prejudicial, the federal judge could dismiss, again as a matter of discretion.

A major assignment of "cause", following Wainwright, has been attorney error. The Administration, in its analysis of the bill, states that proposed subsection (d)(1) would recognize constitutionally ineffective counsel as constituting "cause" but would not recognize "lesser degrees of attorney error." Yet subsection (d)(1) refers to "State action" that causes "the failure to raise the claim properly." Constitutionally ineffective counsel is not state action[27] and would therefore, despite the Administration's analysis, not constitute "cause" under its statute.

Next, proposed subsection (d)(2) would recognize the presence of "cause" if "the Federal right asserted was not recognized prior to the procedural default." What do these words "was not recognized" mean? Does it mean that a defense lawyer in the state trial in New York is on notice of a recent federal (or for that matter state) trial court decision in California, whether or not reported? I can understand the reasoning that led to the addition of subsection (d)(2) to the definition of "cause," but it seems to me that it is just this sort of ambiguity and unpredictability that should lead us, not to more refined definitions, but rather to no categorical definition at all.

By contrast, subsection (d)(3) adds nothing to and subtracts nothing from the Wainwright "cause and prejudice" test. It uses a rule of reasonableness, as general as the Wainwright test, to determine whether the discovery of post-trial facts shall be considered "cause."

I have not tried to exhaust the possible situations that may arise in which a restrictive definition of "cause" would work serious injustice. Like the Wainwright Court, I believe it would be impossible to do so. I do not doubt, however, that such instances will arise and when they do, S. 2216 will force the federal courts either to find its provisions unconstitutional or to strain the language of the statute beyond its intended meaning. This is often a danger when Congress substitutes a denial of power for discretion through the use of jurisdictional statutes.

One argument in favor of a narrow definition of the word "cause" is that this may lead to a reduction in the number of state habeas filings and ease federal court congestion. This is a baseless guess, as I shall show below, and not worth the price of a constitutional confrontation or the sacrifice of three decades of judicial experience.

I now turn to proposed §2244(e), the limitations period. When a state prisoner is successful in obtaining habeas corpus relief, the state usually has an opportunity to retry him. If the habeas relief comes long after the original conviction, that opportunity may be quite hollow. Witnesses die, evidence disappears. The idea of a limitations period is a sound one -- to an extent. In fact, there already is one in the law. I refer to Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts. It provides:

> (a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

I believe that this provision sufficiently protects the state interest and that there is no need for a specific time limit. Certainly, I am aware of no indication of prejudice to the state with regard to the very small number of state habeas petitioners who are actually ordered released. Nor do I see any reason to provide a federal limitations period if the states themselves do not do so with regard to their own collateral attack procedures. (The Administration's analysis also appears to conclude that if the state imposes no time limit on a prisoner's right to use its collateral remedies, the one-year time limit under the bill would not apply.)

I could accept a carefully drafted limitation. The one proposed is troublesome for several reasons. First, one year is simply too short a period to allow prisoners to seek relief. Section 6 of the bill would allow federal prisoners two years; the longer time is in apparent recognition of the fact that there would be no intervening state collateral proceedings. It must be remembered that we are speaking about people who are in prison. News travels to them slowly. Almost always, they seek to vindicate their legal claims without the aid of counsel. Their access to law libraries and legal knowledge ranges from modest to nearly nil. Their understanding of legal procedures is bare indeed. A one-year period is unreasonable under these circumstances.

Second, the proposed limitation period would interfere with the concern, most recently expressed in Rose v. Lundy,[28] that all claims be filed in one petition. A prisoner with a claim on which the one-year period has started to run and a second claim which has not yet traveled through the state collateral process, will be in a tough situation indeed. If he does not file the first claim, the limitations period may have run by the time the second claim is ready for federal filing. On the other hand, if he files the first claim and loses, he may be charged with abusing the writ when he later files the second claim. See Rule 9(b), 28 U.S.C. §2254.

One occurence that can start the running of a limitations period is "the time at which the Federal right asserted was initially recognized." Here we have the same problem raised with regard to subsection (d)(2). Raised where? Is a prisoner in a state prison in Maine responsible for knowing that a district judge in San Diego was the first to "initially" recognize a particular right? Read literally, the bill says exactly that.

Finally, no subsection adequately deals with the situation where the failure to know the facts which serve as the predicate of the claim is a result of prosecutorial misconduct. Subsection (e)(4) does not suffice. It simply does not address the problem. A person incarcerated ought not have the responsibility to "exercise . . . reasonable diligence" in an effort to discover prosecutorial misconduct, assuming that it's possible at all. A prosecutor who has used false evidence or perjured testimony or who has failed intentionally to turn over exculpatory material ought not be heard to say that the time for raising such a claim has run because the inmate should have "discovered" the illegality "through the exercise of reasonable diligence."

Aside from these textual problems, there are others. There is no provision for stopping the statute from running if, for example, the inmate is insane or under a disability. Furthermore, the provision does not recognize situations in which the state has absolutely no interest in any limitations, at all. For example, what happens if, following a state conviction, the state statute is declared unconstitutional in a later case involving different defendants. It then takes the earlier defendant more than a year to seek habeas corpus relief. Should the state be heard to assert the statute of limitations defense? What possible interest does the state have in continuing to hold the defendant under

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an unconstitutional statute?

I realize the value of a definite limitations period, but these examples, and I am sure there are others, show its dangers as well. I believe the state interest can be recognized through a laches provision, as Congress only five years ago codified in section 9(a) quoted above. Absent any proof that this provision has not sufficed, I do not believe the proposed limitations period should be enacted. But if one were to be enacted, it would have to meet the objections stated earlier. Furthermore, recognizing that it is simply not possible to foresee all of the circumstances under which a rigid limitations period may work gross injustice, I believe any such provision should contain an additional section allowing a federal court to grant a writ of habeas corpus where the circumstances are compelling and failure to do so would work manifest injustice.

Before proceeding to the bill's proposed limitations on Brown v. Allen, I wish to identify two proposed changes that I do believe would be salutary. First the bill allows a denial on the merits despite the failure to exhaust state remedies. I believe this could be useful and save much judicial (and litigant) time so long as there was an additional safeguard. It would have to be clear that the judge would be authorized to deny the application on the merits only where there is no dispute as to the facts (or, alternatively, the factual allegations in the petition were taken to be true) and the judge concluded on review of the petition that development of the facts at a hearing would not affect this result. If, in other words, considering the factual allegations of the petition and all reasonable inferences from them, the trial judge could say that established law forecloses relief, then I believe the proposal deserves adoption.

The second proposed change that appears to me sensible is the substitution of new §2254(e) for current §2254(d). The latter section has truly become unnecessarily cumbersome and repetitious. The proposed change, in a half dozen lines, restates the critical considerations for a habeas court deciding whether to accept a state court's facts.

The bill's proposed overruling of Brown v. Allen is its most troubling aspect. The bill, as stated above, would substitute a test of whether the federal claim was "fully and fairly adjudicated" in state court. If it was, the federal court could not reconsider the federal legal issue urged, even if it thought that the state court was wrong as a matter of federal law. The analysis accompanying the bill specifies four instances in which a federal court could find the state procedure or determination not "full and fair." I doubt that the courts will limit their interpretation of this phrase to the four situations contained in the analysis. As a result, the use of the phrase as a means to avoid "subjective adjudication" appears visionary at best. One can think of few words more likely than "full and fair" to lend themselves to "subjective interpretation," unless they are words like "reasonable," which the bill uses several times with no apparent fear of subjectivity. Even the proposed definitions of "full and fair" contain such words as "reasonable," "reasonably," and "substantial." I am afraid the goal of writing an "objective and categorical" bill on this issue will turn out to be an illusion.

As stated earlier, the Supreme Court, beginning with an eight justice majority in Brown v. Allen, has routinely and unquestioningly accepted the principle that constitutional questions may be relitigated through federal habeas corpus.[29]

There is good reason to do so. Whatever may have been the situation before 1953, it is obvious today that the Supreme Court cannot review all federal questions in state prisoner petitions for certiorari, even where there has been clear error. As has been recognized, the Court can review only important cases, and the fact that a state court may have actually erred in deciding a state defendant's federal claim simply does not make the case important, given the Court's volume.[30]

In its 1980-81 Term, the Supreme Court docket carried 2371 in forma pauperis requests for review. As we know, the overwhelming number of these are criminal appeals. So are a significant number of the 2749 other cases on the docket during the Term. Only one in 40 of the forma pauperis cases were reviewed, more than half of them summarily.[31] If we accept the bill's overruling of Brown v. Allen, we must expect a great increase in the number of petitions from state defendants. Yet we surely know that the Court will not intelligently be able to review all of these. How cynical it is, then, to pretend that the state prisoner is getting any serious federal review at all of his federal claim. To overrule Brown v. Allen is, effectively, to say that only rare state criminal convictions will ever enjoy federal review, despite the fact that federal questions are present in most criminal trials.

Looked at practially, federal habeas for state prisoners is the equivalent of using district judges and magistrates as "special masters" to assure that federal rights are honored in state criminal trials. Justice Harlan recognized that this review gives state courts incentive to "toe the constitutional mark."[32]

S. 2216 purports to continue the review but substitute a "full and fair" standard for the broader authority federal judges now have (but rarely use). That standard, I have argued, will not reduce the workload. But will it further federalism concerns, as the bill's supporters also claim? I do not see how. There would still be federal review of state judgments, though under a different standard than before. If it is the review itself that nettles, the process will continue. State judgments will still, occasionally, be overturned. State lawyers will still have to argue in defense of their convictions in a federal court. Will there be fewer federal invalidations of state convictions because the new standard (is the state determination "reasonable"?) is more deferential than the old one (is the state decision correct as a matter of law?). Again, I doubt it. As anyone who reads the cases in this area must surely be aware, the number of federal habeas grants are miniscule. I see nc basis for concluding that the new standards will make them "more" miniscule or that any difference that does occur will effect federalism concerns.

It also strangely corrupts the way we think about law to say that a federal court's review should be of the "reasonableness" of the federal law resolution, not of its accuracy. I know of no other area of law where that kind of review of law (as opposed to fact) occurs. Furthermore, the notion of a reasonableness review leads to an additional and strange result. What happens if a state defendant successfully applies to the Supreme Court for certiorari? Is that Court limited to a holding that the state court's determination was or was not a reasonable construction of federal law? What if a majority of the Supreme Court disagrees with the state court's result but also finds it reasonable? Can a state court's decision on the merits of a federal question be upheld as reasonable and (if a Supreme Court majority disagrees) also be wrong? If it is both reasonable and wrong, should it stand or fall? I cringe at the notion of this standard for a "law" review. If it served a useful purpose, I would look at it harder. But I do not believe, as I have said, that it will either advance federalism concerns or appreciably reduce the workload.

At rock bottom, of course, there has through our history been state resistance to federal review (even by the Supreme Court) of federal questions in state judgments. But that debate was settled very long ago.[33] It should not be heard to resurface now because the federal review occurs in a different place, one made necessary by a different society and by the increased protection the Constitution has, over the last several decades, been held to assure persons charged with crime.

V. THERE IS NO NEED FOR S. 2216

There remains the argument that the bill is needed because a large number of state habeas corpus petitions are congesting the federal courts. There are two answers to this argument. First, it isn't true. Second, the bill would not make a difference anyway. Let me explain what I mean by the second answer before proceeding to a longer discussion of the degree to which state habeas cases truly clog federal court dockets.

The question is how wide ought we open the federal court door to state prisoners with claims of federal rights violation. No one has suggested closing it entirely or opening it wide and permanently to everyone. If I can take this image a step further, the Supreme Court has proposed a sort of swinging door in cases of state procedural defaults with the thrust and degree of the swing determined in part by assessing the "cause" for the procedural default and the "prejudice" if the petitioner's substantive claim goes unreviewed. S. 2216 would change that result by nailing the door into a fixed position in all procedural default cases, come what may.

If the door is not going to be closed entirely, that is if there are going to be categories of state prisoners for whom it will be open despite procedural defaults, petitioners are going to try to squeeze themselves into those categories. After all, we are not talking about putting an armed guard at the clerk's office to prevent actual filings of petitions. The petitions will therefore come, so long as the door is open at all, and the petitioners will make arguments that they fit within one of the exceptions to the rule that a procedural default forecloses review, whether the foreclosure rule is a matter of jurisdiction, as the bill would have it, or a matter of discretion, as Wainwright provides. It will take time, as now, to dismiss the petitions. Someone will have to review them, as now, to determine if their claims are indeed within an exception as the prisoner asserts. The state will have to respond to the ones that assert a colorable claim, as now. And, as now, a large number of filings will be dismissed very early on. To suggest that narrowing the categories will somehow reduce the filings appreciably is wishful thinking. As long as the door is open to the "needles," the "hay" will also enter.

A more dramatic argument against the claim that the bill will unclog the courts is that they are not now clogged[34] with state habeas petitions. Let us look at the figures provided by the Administrative Office of the United States Courts. All figures are for the year ending June 30, 1981.[35]

In that year, there were 31,287 criminal and 180,576 civil filings in district courts, for a total of 211,863 filings. Of these, 7790 were habeas corpus petitions of state prisoners. (There were many more actions filed by state prisoners, but these did not seek habeas corpus relief. The proposed bill would not affect them.) This means that 3.67 percent of the total filings in 1981 were state habeas petitions. This hardly amounts to clogging. (If state habeas petitions are taken as a percentage only of civil filings, the result is 4.31 percent.)

The number of state habeas petitions has remained fairly constant. Although they vary from year to year, the 1981 figure actually shows a slight decline (0.7%) from the total for 1975. The total in any year is obviously dependant on the level of state criminal trial activity and the number and length of state prison sentences. A true assessment of the relative rates of habeas filings -- which I do not believe has been made -- would have to take these numbers into account.

The stage at which habeas petitions are disposed of is also informative. Of the 7,302 habeas petitions terminated in the year ending June 30, 1981, 7,018 (96.1 percent) were dismissed before pretrial. The equivalent percentage for all civil cases terminated at this stage (excluding condemnation cases) was 77.0.

Only 165 (2.2 percent) of all habeas cases terminated during or after a trial (161 of them before a judge). For all civil cases (excluding land condemnation cases) 11,416 (6.6 percent) terminated during or after a trial (4,702 of them to a jury).

If we consider the total number of civil cases (other than land condemnation) that reach pretrial or trial, only 0.7 percent are state habeas cases.

How long do state habeas cases stay in the courts? Again the figures are dramatic. For all civil cases (excluding land condemnation, habeas and deportation cases), median time in the courts was nine months. For state habeas cases, the median time from filing to dismissal was five months.

There were 204 habeas trials in the twelve months ending June 1981. Of these, 194 were to a judge and 182 of them took two days or less to try. By contrast, there were 20,940 civil and criminal trials in the same period, nearly 40 percent of which (8,228) were jury trials, and 4,465 of which took four or more days to try. In other words, less than one percent of all federal trials are held in habeas cases and a small fraction of one percent of all trial days are spent on habeas cases. Virtually none require juries. What these figures show is:

.that the number of habeas petitions are a miniscule percentage of the total number of filings;

.that nearly all are dismissed on a review of the papers;

.the dismissals occur quickly; and

.that when there are trials, they almost always consume less than two days of court time.

It may be argued that the real burden that habeas filings impose is on the respondents in these cases -- the various state attorneys general's offices. Furthermore, there are obvious burdens upon court personnel when the cases are filed, and on judges who, even if they ultimately dismiss most habeas cases, must review them before doing so. I do not see how the proposed bill would ameliorate this situation. Since it recognizes several routes to habeas review, whether or not there has been a procedural default, the state will have to respond to the inmate's claim of a right to a federal hearing and a judge will have to decide who wins. The court personnel will have to process the case as before. Proposed §2254(d), by effectively overruling Brown v. Allen, will not thereby reduce the caseload. In fact, one might expect years to be spent identifying the meaning of "fully and fairly adjudicated." The issue might change but the time spent working on the new issue does not offer to be any less. The words "fully and fairly adjudicated" are not self-defining. Even the Administration's analysis proposes four categories of definition (including reasonableness) and we can be sure the courts will not consider themselves limited by this legislative history. So it seems to me that the demerits of the proposal, taken in gross are many and the benefits few. The benefits can be enacted without the burdens, and should be.

VI. CONCLUSION

We accept the congressional role in this area. But recent case law and the statistical evidence of the demands habeas petitions make on the federal courts and respondents both argue against a need for congressional intervention now. The federal courts are not being overwhelmed with state habeas petitions. The relatively small number of such petitions S. 2216 would affect in any event does not justify its enactment. This is especially so given the constitutional confrontation to which it may lead and the "miscarriages of justice" that may stand uncorrected if the bill becomes law. The Supreme Court has shown itself attentive to the problem and capable of finding solutions. There is no reason for Congress to act and many reasons to hesitate.

Thank you for this opportunity to present our views.

FOOTNOTES

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[1] Until 1867, there was no federal authority to review detention under state law. Bator, Finality In Criminal Law And Federal Habeas Corpus For State Prisoners, 76 Harv. L. Rev. 441, 465 (1963). No justice has suggested that Congress is required to grant such authority. Compare Fay v. Noia, 372 U.S. 391, 406 (1963), with Wainwright v. Sykes, 433 U.S. 72, 105-106 & n.8 (1977) (Brennan, J., dissenting). Determinations of state habeas petitions have been based on statutory construction and notions of comity. See, e.g., Wainwright, 433 U.S. at 77 & 84. See also Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 170-72 & n.153 (1970), Note, Developments on the Law — Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1268 (1970), Brown v. Allen, 344 U.S. 443, 486 (1953). Federal jurisdiction over the habeas corpus petitions of federal prisoners has existed since 1789. Wainwright, 433 U.S. at 78. There appears to be no judicial authority that requires such jurisdiction when confinement is pursuant to the judgment of a federal court. However, we take no position, at these Hearings, on whether some of the more restrictive provisions of the bill violate the Suspension Clause of the Constitution. Art. I, §9, cl.2. See Paschal, The Constituion and Habeas Corpus, 1970 Duke L. J. 605. We do not consider the fact that jurisdiction

was lacking over state prisoner petitions until 1867 to be conclusive evidence of an unlimited congressional power to impede recourse to the writ.

[2] *See*, *e.g.*, *Wainwright*, 433 U.S. at 91-92 (Opinion of the Court); 433 U.S. at 94-97 (Stevens, J., concurring). *See also Fay*, 372 U.S. at 438 (recognizing discretion). Section 6 of the bill, applying to federal prisoners, parallels Section 2 of the bill, which applies to state prisoners. Each provides an equivalent definition of "cause" and each provides the same occurences from which to measure their respective limitations periods. Accordingly, for the balance of this statement, while we will sometimes refer only to "state" prisoners with regard to these parallel provisions, our comments apply equally to federal prisoners.

[3] 344 U.S. 443 (1953).

[4] 422 U.S. 72 (1977).

[5] *Id*. at 91.

[6] *Id*. at 96.

[7] *Id*. at 91. Concern that habeas relief be available in case of a miscarriage of justice is repeatedly voiced. *See Brown*, 344 U.S. at 503 (Frankfurter, J.) and 553 (Black, J.); *Fay*, 372 U.S. at 426; Jackson v. Virginia, 443 U.S. 307, 322 (1979).

[8] 344 U.S. at 498.

[9] Id. at 537.

[10] Bator, supra note 1, contains a thorough review of the cases and statutes through Brown v. Allen. For subsequent developments see Michael, The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Proceedings, 64 Iowa L. Rev. 233 (1979).

[11] 344 U.S. 443 (1953). Eight justices joined in this holding. Justice Jackson did not. Since Brown, and as recently as last January, every justice has routinely accepted its conclusion. See Smith v. Phillips, 102 S.Ct. 940 (1982). See also discussion of Sumner v. Mata at text accompanying note 21, infra.

[12] 372 U.S. 391 (1963).

[13] Id. at 439-440.

[14] 433 U.S. at 91-94 (Burger, C.J., concurring); id. at 94-97 (Stevens, J., concurring).

[15] 411 U.S. 233 (1973).

[16] 425 U.S. 536 (1976).

[17] Wainwright, 433 U.S. at 87-91. Wainwright makes it clear that its cause and prejudice rule is "narrower than the standard set forth in dicta in Fay" and expresses no opinion on whether the Fay standard should continue to apply to facts like those in Fay. Id. at 87 & n.12.

[18] 372 U.S. 293 (1963).

[19] 428 U.S. 465 (1976).

[20] 443 U.S. 545 (1979).

[21] 449 U.S. 539 (1981), op. on rehearing after remand 50 U.S.L.W. 3760 (Mar. 23, 1982). See also Lonberger v. Jago, 651 F.2d 447 (6th Cir. 1981), cert. granted 50 U.S.L.W. 3547 (Jan. 11, 1982).

[22] Wainwright sometimes uses "actual prejudice," 433 U.S. at 91, and sometimes only "prejudice." Id. at 87. The accompanying analysis of the bill makes it clear that the bill's amputated "cause and prejudice" test is intended to overrule the Fay v. Noia "deliberate bypass" test even with regard to non-delegable decisions. Judicial opinions on this issue have been contrary. See note 14, supra. See also Barker v. Jones, 668 F.2d 154 (2d Cir. 1982).

[23] See, e.g., Goodman & Sallett, Wainwright v. Sykes: The Lower Federal Courts Respond, 30 Hast. L. J. 1683 (1979).

[24] In addition to the articles cited at notes 10 & 23, supra, see Spritzer, Criminal Waiver, Procedural Default and the Burger Court, 126 U. Pa. L. Rev. 473 (1978), Cover & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L. J. 1035 (1977).

[25] Hill, The Forfeiture of Constitutional Rights in Criminal Cases, 78 Colum. L. Rev. 1050 (1978).

[26] This was Daniels v. Allen, 344 U.S. 443 (1953). Justice Harlan, not then on the Court, later said that "persuasive arguments can be made that [the one day delay] is not" an "adequate" state ground. 372 U.S. at 462.

[27] Polk County v. Dodson, 102 S.Ct. 445 (1981); cf. Ferri v. Ackerman, 444 U.S. 193 (1979). The eight justice majority on the Polk County Court emphasized the importance of a prisoner's right to challenge his lawyer's competence . "For an innocent prisoner wrongly incarcerated as the result of ineffective or malicious counsel, [habeas corpus] is the most important form of judicial relief." 102 S.Ct. at 453 n.18.

[28] 50 U.S.L.W. 4272 (Mar. 3, 1982).

[29] See note 11 supra. The "fully and fairly adjudicated" test is based on Stone v. Powell, 428 U.S. at 494. But the test does not so easily transfer to the different soil of other cases, as the Court recognized in Rose v. Mitchell, 443 U.S. 545 (1979). Notably, the Court has never applied this standard to issues or claims that go to the accuracy of the truth determination process.

[30] Bator, supra note 1, at 513-14.

[31] 50 U.S.L.W. 3044 (Aug. 11, 1981). The Court reviewed only 59 of the in forma pauperis cases, 32 of them summarily.

[32] Mackey v. United States, 401 U.S. 667, 687 (1971).

[33] Cohens v. Virginia, 6 Wheat. 264 (1821); Martin v. Hunter's Lessee, 1 Wheat. 304 (1816).

[34] The tendency to discuss these important issues in terms of metaphors ("clogging the courts," "the flood of petitions," "the war on crime") is troublesome. I discuss this phenomenon in the March 27, 1982 issue of *The Nation* (p. 365).

[35] All statistics come from *Annual Report of the Director of the Administrative Office of the United States Courts* (1981).

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Stephen Gillers

April 12, 1982

Honorable Howell Heflin
United States Senate
Washington, DC 20510

Dear Senator Heflin:

Thank you for this opportunity to present additional written views on S. 653 and S. 2216, two bills that would alter federal court jurisdiction over habeas corpus petitions by state prisoners and, in the case of the second bill, restrict review of a federal inmate's §2255 motion to vacate his sentence.

As you know, my views on each bill were fully set out in my prior written submissions and oral testimony. With regard to my written submission on S. 2216, I have made some non-substantive modifications and a final draft is enclosed.

I have neither heard nor read anything that would change my views. Indeed, recent developments have only made them stronger. Let me list here some of the salient points I think the Congress ought to consider.

First, with regard to the proposed definitions of "cause," I have fully explained why I think definition is a bad idea. Recently, the Supreme Court decided Engle v. Isaac, 50 U.S.L.W. 4359 (April 5, 1982), in which it refused to find certain facts as constituting "cause" and reemphasized the following:

> The terms "cause" and "actual prejudice" are not rigid concepts. They take their meaning from the principles of comity and finality discussed above. In appropriate cases those must yield to the imperative of a fundamentally unjust incarceration.

Ironically, both bills would define "cause" in a way more charitable to the petitioning inmate than did the Supreme Court in Engle v. Isaac. I doubt that the Justice Department will now push that more charitable definition. I must say, for myself, that I find Engle v. Isaac to be a very troubling opinion, even more so in tone than in its actual holding. Nevertheless, I would rather live with that opinion and a fluid and flexible definition of the words "cause" and "prejudice" than overturn Engle v. Isaac at the expense of an immutable definition of either. In the long run, I believe more injustice will be done through the latter route than through the former.

Second, I urge your Subcommittee and Committee to do nothing to dilute the holding in Brown v. Allen. I give many policy reasons in my written testimony on S. 2216 for this position. I do not repeat them here. Most important, I want to emphasize a pragmatic consideration. Brown v. Allen was, among other things, a method of redirecting the traffic of the habeas cases to lower federal courts and away from the Supreme Court on certiorari. Legislatively overturning Brown v. Allen now would only increase the Supreme Court's certiorari work. I think it noteworthy that since it was decided three decades ago, no member of the Supreme Court has suggested that Brown v. Allen be compromised. At a time when the court urges the abolition of its non-discretionary appellate jurisdiction, overruling Brown v. Allen would seem to be especially inappropriate. For this very practical reason, as well as the policy concerns expressed in my statement, I urge rejection of the Justice Department's proposal on this issue.

Third, as I said in my oral testimony, there are two very sensible reforms Congress can begin to investigate and which, if undertaken, would likely reduce the number of habeas filings. The easier reform, though significantly less important, is to explore ways of informing state prisoners of the elementary procedural rules in the federal system. For example, we lawyers speak casually of "exhaustion of remedies." But this phrase is not self-defining. I think it is quite interesting that Professor Robinson (in his study of federal habeas corpus review of state court judgments undertaken for the Federal Judicial Research Program) found that more than half of all federal habeas filings in his sample were dismissed for failure to exhaust remedies. After Rose v. Lundy, this number will likely increase. It would seem to me to be terribly easy to educate state prisoners about their obligations to first exhaust available state remedies. A second area of education ought to concern the risks, under Rule 9(b), of filing multiple petitions. Further review will likely reveal additional misconceptions that can be corrected through a booklet, in plain English, available to state prisoners from the federal court.

The other reform Congress ought to begin to explore is how to improve the quality of assigned counsel in state criminal trials. Congress certainly has the authority to enter this area, given the Sixth Amendment guarantee of effective assistance of counsel. This is not the place to rehearse all the ways in which assigned counsel may be improved. Notably, counsel provided by organized legal aid societies are generally far superior than private counsel assigned by the court. In New York, I have observed that there are many people assigned to represent indigents who could not sustain their law practice if they also had to attract private clients. I have also observed the quality of their representation first-hand. It is poor. Many do not know how to try a case or make an intelligent suppression motion. Of course, I do not mean to denigrate all assigned counsel. Many are quite good and make themselves available for indigent assignments as part of a personal commitment to the quality of justice. As I told you at the hearings, I would be delighted to assist in any way I could if you or your colleagues were interested in identifying any appropriate federal role in this area.

Fourth, as I testified, I agree with the Department's proposal to permit denial "on the merits" of a habeas petition despite the failure to exhaust state remedies. In my view, however, it must be specified in the bill that the judge, before issuing such a denial on the merits, find: (a) that the factual allegations of the petition and all reasonable inferences from them reveal that the petitioner is not entitled to relief as a matter of law; and (b) that a factual hearing in state court is not likely to result in the development of facts (possibly under the state's control) that would affect this conclusion. In other words, it does not seem appropriate to me to permit a denial on the merits when there has been no factual hearing unless it can be said that no version of the facts, taken in the light most favorable to the petitioner, are stated or could be adduced that would support the relief requested. This parallels the standard on summary judgment.

Fifth, I also approve of the proposed change intended by §2254(e), which would replace current §2254(d). The language in the current section is awkward at best, unintelligible at worst, and seriously in need of redrafting. Let me suggest, however, that the words "clear and convincing evidence" at the end of the proposed subsection 2254(e) be changed to delete the words "clear and." The current statute refers to "convincing evidence" only and, although this is in a slightly different context, that language has already been interpreted by the Supreme Court in Sumner v. Mata. With regard to Senator Chiles' concern that the Department's language could give every petitioner a right to a hearing at which he would attempt to rebut the presumption, where under current law there is no such right, an additional sentence could be added disspelling this inference. For example, it might be stated: "The Court shall not hold a hearing unless the applicant states facts which, if true, would constitute convincing evidence rebutting the presumption established by this subsection."

Sixth, let me say something about the proposal that only a circuit judge be empowered to issue a certificate of probable cause. Now, either the district judge who denied the petition or a circuit judge may issue one. The reason for the current rule is plain. The district judge is most familiar with the merits of the case and therefore is in the best position to say whether an appeal is in order. The circuit judge to whom the petition for a certificate of probable cause comes must first familiarize himself with the case before deciding whether to issue such a certificate. In other words, much of the work the judge may ultimately have to do on the merits will have to be done in deciding whether a certificate should issue. This argument might lead to the conclusion that only district judges, already familiar with the case, be authorized to issue such certificates. The problem with that, however, is that it gives the district judge the power to block review of his own decision simply by denying a certificate. I recognize Judge Friendly's earlier criticism, but I have not been persuaded by it. Nor have I seen data which would suggest that the current regime has resulted in abuses.

Seventh, a word about the proposed statute of limitations. As I testified, I believe the one-year period is much too short given the fact that most petitions are filed pro se, given the complexity of federal jurisdiction, given the ignorance many individuals (lawyers included) have about the difference between a federal and state claim, and given the imprisoned situation in which the petitioner finds himself. Compare Mills v. Habluetzel, 50 U.S.L.W. 4372 (April 5, 1982).

I also found the exceptions too narrow. As I testified, I could accept a reasonable period of limitations with appropriate exceptions. I believe a limitations period ought to include at least the following:

(a) The Administration's analysis states, but the bill does not make clear, that no limitations period shall apply if the state in which the petitioner is incarcerated itself has no limitations period on its own collateral attack proceedings. If the state has no such limitations period, there is no reason why the federal government should have one since there is no state policy to honor. As I say, the Administration's analysis agrees, but this is by no means spelled out in the bill and ought to be.

(b) The Administration proposes that one event from which the limitations period shall run be "the time at which the Federal right asserted was initially recognized." You have heard criticism of the phrasing of this provision and I believe you or Senator Thurmond questioned Mr. Rose about it. I understand what the Administration is getting at. The language ought to be changed to read: "The time at which the Federal right asserted was recognized by the United States Supreme Court to be retroactive to the conviction of the applicant."

(c) There ought to be a different kind of limitations period where the basis for the claim is constitutionally ineffective assistance of counsel. This is because there is no particular period of time at which the petitioning inmate can be expected to realize that his counsel was ineffective. The inmate is not a lawyer. He may have trouble getting copies of the trial transcript. Even when he does so, it will be difficult to assess the quality of his lawyer's representation. While I do not suggest that an inmate ought to be able to file repeated petitions alleging the same ineffective assistance, I do believe that he ought to be permitted to file one, no matter how long after the conviction it may come, so long as it comes reasonably after the time at which he actually learned of counsel's ineffectiveness. Consequently, I would add as an additional event from which the limitations period may run, the following: "Where the basis for the application is a claim of ineffective assistance of counsel, the time at which the applicant had actual knowledge of counsel's ineffectiveness.

(d) Similarly, where the basis for the claim is prosecutorial or judicial misconduct, I do not believe a "should have known" standard is fair. That is, the prosecutor ought not to be allowed to respond to a petition charging the prosecutor with misconduct by admitting the misconduct and then stating that the imprisoned applicant "should have known" about it sooner. Consequently, I would add a provision as follows: "Where the basis of the application is a charge of prosecutorial or judicial misconduct, the time at which the applicant had actual knowledge of such misconduct."

(e) A provision must be added tolling the statute of limitations during such periods as the applicant may be insane or under a disability.

(f) A provision must be added making it clear that the statute of limitations does not apply to a claim that the statute under which the petitioner was convicted is unconstitutional, facially or as applied. As worded, the Administration's bill would disable a petitioner from seeking habeas relief if the statute of limitations had run even if, in another case, the statute under which the petitioner was convicted had been declared unconstitutional. I see no state interest in continuing to incarcerate someone under a statute that is unconstitutional, either facially or as applied.

(g) Finally, there must be an "escape hatch" in the case of clear injustice. I suggest the following language:

> Notwithstanding the foregoing, a court may grant a writ of habeas corpus despite the expiration of the limitations period if denial will result in manifest injustice on the issue of guilt or innocence or on the legality of sentence.

I hope these suggestions have been helpful. If there is anything further I can do to assist you or your staff, please let me know.

Sincerely yours,

Stephen Gillers

Stephen Gillers

SG:sg
Enclosure

Senator Heflin. On behalf of the American Civil Liberties Union, could you draft language on your recommendations, where we could review that language on the various parts that you mentioned, like the manifest injustice?

In other words, you made some statements pertaining to positions that you would take on it, and it may well be that there is not as much difference as appears on the surface between your recommendations and other recommendations that have been made. I think it would be an evaluation of language involved in the comparison between the two.

Professor Gillers. I would be delighted to attempt that, sir.

Senator Heflin. So, if you could, we would appreciate it if you would draft such language and present it, where we could review it.

Professor Gillers. Fine.

Senator Heflin. All right.

Professor Gillers. Senator, I must ask to be excused, since I must teach a class this afternoon and have to get back to New York.

Senator Heflin. All right. I was going to get into how, federally, we are going to improve the assigned counsel procedure. I was wanting to get into that, but maybe at a later date.

Professor Gillers. Senator, I think that is one of the most important things that this body and the State legislatures could do. And if you have any inclination to examine that problem, I would not only volunteer myself, but volunteer a half dozen of my best students to help you.

Senator Heflin. Thank you.

Professor Gillers. Thank you, Senator.

Senator Heflin. Ms. Bamberger.

Ms. Bamberger. I thank the committee for the opportunity to speak today.

Many of the arguments in support of the pending legislation are insupportable because they are based on misperceptions and mistake of law or fact. Although there can be improvements in administrative processing of habeas corpus cases, we believe that the current proposal to overhaul habeas corpus is ill advised and should be reconsidered. We hope our comments today are treated substantively and seriously and that our opportunity to speak is not merely a procedural formality.

The major complaint that we hear about habeas is that federalism is being destroyed. Article III of the Constitution imposes upon the Federal judiciary the obligation to hear questions arising under the Constitution. While Congress does have the right to determine how those questions will be heard, it certainly has the obligation to determine that they will be heard in some fashion.

To argue, in the face of article III, that the State courts are coordinate branches of the government for reviewing constitutional issues is to misread the clear words of article III. If the Congress chooses to limit the availability of habeas corpus, we would suggest that it is equally appropriate and required by article III that other kinds of remedies be made available to State prisoners who have Federal constitutional claims to be heard.

In fact, the habeas remedy has been the traditional one for testing custody and therefore was adopted and is being used to present constitutional challenges to custody. The elimination or severe restriction of the habeas remedy would leave only the Supreme Court discretionary jurisdiction on certiorari from decisions of the highest court of the State which has jurisdiction over the case to hear Federal constitutional issues coming from State courts. That would reduce the number of cases which are heard on the merits under article III to perhaps four or five each year.

We do know that whatever the number of petitions filed, some of which do not raise appropriate constitutional claims, there are substantial constitutional issues raised in many of these petitions, whether or not they ultimately succeed.

The second argument made by advocates of restriction of habeas corpus is the doctrine of comity. Comity is simply the principle that State courts will be given the first opportunity to correct such constitutional errors as exist in a case, and that their decisions will be respected. The habeas corpus statute and the application of that statute in recent Supreme Court cases—for instance, *Wainwright* v. *Sykes* and the very recent *Rose* v. *Lundy* decision—make it very, very clear that State courts will be given the opportunity to hear these issues first. And if they are not given such an opportunity, absent such important factors which are defined as cause, Federal review is precluded. Any argument based on a lack of respect for State courts in the comity area is simply unfounded; it is based on a misperception.

The third argument advanced by proponents of habeas corpus is that finality is delayed and that stale claims are presented. As a matter of constitutional theory, there is no such thing as a stale claim. The writ is used to eliminate an unconstitutional period of detention. It is the detention that the writ is directed to, and if the detention is illegal, it is a continuing illegality and therefore there is no stale claim. The Attorney General, in his notes, argues that claims can be cut off, as, for instance, by rule 33 of the Federal Rules of Criminal Procedure. But that goes to limiting the presentation of a constitutional claim and is covered by the doctrine of bypass and cause. To add to it the additional factor that habeas, as relief against continuing illegal detention, is separately barred is not constitutionally correct theory.

We are told that finality will aid in the rehabilitation of prisoners. I would like to point out to you that this argument is ludicrous; it is unsupported by any document or any court decision anywhere. The decisions of our courts dealing with the conditions of confinement in our prisons reveal that our prisons are a national disgrace. And while we are not here to discuss conditions of confinement, to eliminate habeas corpus on the spurious ground that petitioners would be reformed and rehabilitated does not make any sense in light of the conditions of confinement. In fact, because access to courts aids in rehabilitating a prisoner by restoring a willingness to adhere to rules of the society, corrections experts have stated that access to courts is a very positive factor in the treatment of prisoners.

Second, finality is supposed to eliminate the possibility of retrial where a State may not be able to obtain a conviction because of a lapse of time. I would suggest to you that in most cases, a lapse of time is not due to the petitioner; he wants to get out and he is not waiting 1 extra minute to file his petition. I suggest to you that the lapse of time is due to the inordinate delays in the processing of State appeals, and State postconviction remedies, and in the time for processing of Federal habeas corpus petitions.

I would further suggest to you that perhaps the delay can be focused in capital cases where Federal judges have highest concern that the proceedings prior to the filing of the habeas writ have been performed correctly and constitutionally with no mistakes. If our focus is to be on capital cases, I would suggest that we must remove those cases from the scope of habeas corpus discussion. They present other problems of policy and politics which are inappropriate here. Because of the inappropriateness of the capital punishment to this discussion I suggest that it is important to beware that lurking beneath this debate may be capital punishment issues which should be reserved for another day..

Capital punishment cases can be treated differently by simply removing them from the habeas process and setting up a separate court or structure to evaluate those claims. And if review should be more expeditious then it can be done speedily. I would suggest that perhaps our consideration of habeas is confused by the merging of these two issues.

To get back to the question of being able to retry a person, our current discussions indicate that there are enormous technological advances for the preservation of testimony, either through video or audio techniques. These forms of preserving evidence are currently available and rules of evidence all over the country have been changed so that these forms of evidence can be admitted if a witness is dead or his memory has failed.

To deny habeas corpus oversight when there are techniques which will enable a State both to retry a person on its evidence and to protect the constitutional rights that are involved serves no purpose and is based on a misperception of where we are in the development of the law.

Finally, there is a claim that we release guilty people by the issuance of writs of habeas corpus. Let me say that few writs are granted, but that does not mean anything in the context of the importance of the writ, because most writs are denied for failure to exhaust or bypass, which are other problems which we will direct ourselves to. In the few cases where writs are granted, it is generally for a new trial. The new trial is not prevented, as we just said, because of available ways to preserve testimony. But, once more, we cannot minimize the importance of those decisions which come from the habeas corpus remedy; *Gideon* v. *Wainwright,* for one, which changed the law of this country with respect to providing counsel for people charged with crimes. It is inconceivable to us in 1982 to think that a criminal defendant should go into the courtroom without a lawyer, but that was the law until *Gideon* came down. Who knows what case will be important and make enormous changes in the structure of our system and our due-process conceptions?

The last argument raised by advocates of restricting habeas corpus is judicial economy. I think the statistics of the Administrative Office of the U.S. Courts put this issue to rest. First of all, I would like to say that where the courts have been given jurisdiction by Congress to act in a certain way—and it is our position that the Federal courts must have some kind of jurisdiction over these constitutional issues—it is the responsibility of a judge to treat these cases as he would any other case—an antitrust case, a diversity of citizenship case, a bankruptcy case. That is what the judge is there for; his function is to decide cases which present issues within his jurisdiction. If it is too much work for him or for her to do it, perhaps we should look at ways of administratively tailoring the process, and that is being done, with the help of the National Center for State Courts in Federal and State courts all over the country. But to say that judges should not decide these cases because they are overworked is simply not responsive to the responsibilities of the courts.

Now, to the statistics, in 1980 there were 4.5 million criminal cases tried by the courts of general and criminal jurisdiction in the United States. In 1981—that would be the following year—there were 7,790 habeas corpus petitions filed in the Federal courts. I might add that this number has been relatively constant for the last 5 or 6 years and, in fact, there has been a decrease in habeas corpus petitions in the last 2 years. So, the argument that these cases are on the increase is simply not statistically supported.

It is true that since the 1950's, the number has gone up, but why should it not go up? We have given rights to people who had been denied rights prior to the 1950's all over the country. The right to counsel, the right to a jury trial, the right to a fair jury, the right to an impartial judge, the right to confrontation—all of these rights have to be protected and we cannot condemn a person who seeks to have his rights vindicated in the courts because we are too busy to hear them.

Compare the 7,790 cases filed in the Federal courts in 1981 with the 60,000 diversity of citizenship cases filed in the Federal courts in 1981. Let me ask you, what is the law to be applied in diversity cases? State law—law which the States are supposed to apply to their own citizens.

No one is complaining about the 60,000 diversity cases, only the under 8,000 habeas corpus cases in which Federal constitutional rights, which under article III must be decided by the Federal judiciary, are to be determined.

Compare the under 8,000 habeas corpus cases with the 180,576 total civil filings, and we find that the percentage of habeas cases is very small.

Let us go to the question of hearings before Federal courts. There were 165 hearings held before Federal district judges in the United States in 1981; that is less than 1 hearing for each judge. And although magistrates held hearings, that is what they were created for, to provide an alternate means to provide these hearings.

Now, I would like to direct my attention to the specific provisions of S. 2216. Sykes proposes a new test; it overrules *Fay* v. *Noia* with respect to certain rights. *Noia*, as we know, required a deliberate forfeiture by a defendant of his rights. Sykes changes that and says that if the individual did not follow State procedures for raising a particular claim, then the Federal courts could not consider the claim because there was an independent State ground for the State court not to hear the claim.

We suggest that the forfeiture question cannot be codified in a statute. The reason for that is because State procedures vary greatly as to what is required to preserve an issue, and I will give you an example. In New York, even if a trial lawyer does not raise an issue at the trial court level in accord with State procedures, he may still raise the issue on appeal. And in the interests of justice in the appellate division, the appellate division can consider the issue which had not been properly raised at the trial court. The appellate division also has the power to affirm a conviction without an opinion. Therefore, we might not know whether or not the State court has decided the issue on the merits or because of a procedural bypass of its own rules. On the other hand, the Supreme Court requires only the opportunity for the appellate division to hear that issue.

State procedures vary and it is impossible to determine or to codify the rules of the 50 States as to what would be a compliance with State procedures; there are too many variables.

Next, we have the question of codifying cause. The Supreme Court deliberately left that open in *Wainwright* v. *Sykes*. S. 2216 defines and limits cause to State action. State action does not include counsel's incompetence. The decision in that case is *Polk County* v. *Dodson* and it was decided in December 1981, and the Government's statement, I think, is in error with respect to there not being any decision on this point.

Further, the question of the incompetence of counsel is not an appropriate standard to determine cause. Incompetence of counsel, under the sixth amendment, goes to counsel's total performance in the whole trial and is, itself, a separate issue of constitutional proportions which can be raised in a habeas petition. What we are concerned with here is whether the lawyer properly raised a particular issue which itself is of constitutional proportions. And if the lawyer does not know about a particular issue and he fails to raise it, the rest of the job that he has done at the trial is really irrelevant to the determination of whether that particular issue should be heard by the Federal courts.

Under *Wainwright* v. *Sykes,* the job of counsel is so critical that eliminating his role or her role in the defense of a case as cause does not make any sense. Justice Burger's concurring opinion in *Sykes* points out that the client must rely on counsel for all trial strategies, and to eliminate counsel's ignorance or negligence as cause is simply doing the client a disservice, as well as perhaps convicting him improperly.

The proposal of S. 2216 also would eliminate from the *Fay* v. *Noia* standard rights which the defendant himself or herself must waive; for instance, the right to counsel or the right not to plead guilty or the right to a jury trial. The impact of S. 2216 is to overrule a whole line of Federal Supreme Court substantive decisions with respect to those rights which the defendant himself must waive and which cannot be done through counsel.

Statute of limitations, we believe, is an——

Senator **Heflin**. Could you summarize the remaining portion of yours? The whole prepared text will be included in the record, but we do have a little economy of senatorial time and if you could conclude in about 2 more minutes——

Ms. **Bamberger**. Yes; I certainly can do that.

Senator **Heflin**. Thank you.

Ms. **Bamberger**. We believe that the statute of limitations provision is unconstitutional as a suspension of the writ. While it is true that the Congress may not have to use the writ process, once the writ process is enacted by legislation, the suspension clause of the Constitution would apply and therefore the statute of limitations would be unconstitutional.

We believe that the proposal of the Government under 2216 is unworkable after the Supreme Court's decision in *Rose* v. *Lundy,* and we further believe that the 1- or 3-year period is unworkable because of the practicalities of prison life. As we note in our paper, petitioners are in prison and must contend with security regulations prohibiting use of libraries, prohibiting contact outside by mail, prohibiting the receipt of papers, and limiting access to those documents and books and volumes and resources which would make it possible to timely file, under these provisions, a petition for a writ of habeas corpus.

Finally, we reach what we believe to be S. 2216's virtual bar to habeas if the State provides a full and fair hearing. First of all, to answer your earlier question, Senator Heflin, concerning what this full and fair hearing would require, it seems to me that if we are worried about comity and respect for State court judges, the full and fair hearing requirement is the antithesis of that because it would require a Federal judge to delve into the processes of the State court and the State appellate court, to obtain confidential bench memorandums in cases in which State appellate courts have affirmed convictions without opinion, and would prolong the fact-finding process to such an extent that it would simply be easier to go to the merits.

But what is more, the Government acknowledges that a full and fair hearing has nothing to do with the correctness of the decision, and that is, after all, what we are about when we are dealing with constitutional rights: Is the decision of the court correct? Even a State's full and fair hearing may produce a decision contrary to the law and in opposition to what the principles of the Constitution mandate. If the decision is wrong a defendant should not be confined premised on the conviction.

The full and fair hearing concept and the reasonable decision requirement, which the Government says applies in S. 2216, simply means that a State court can reject the findings of the Federal courts in its circuit and can use any standard it wants to determine whether or not a constitutional right has been violated. That is an inappropriate standard for determining constitutional rights.

The concern for fact finding and certificates of probable cause we would leave to our written statement.

Senator **HEFLIN**. Thank you, Ms. Bamberger.

[The prepared statement follows:]

STATEMENT OF PHYLIS SKLOOT BAMBERGER

on behalf of

THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION,
THE LEGAL AID SOCIETY OF NEW YORK CITY, AND
FEDERAL DEFENDERS

before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

concerning

S. 2216

Amendments to Title 28 of the United States Code
to Modify Habeas Corpus Procedures by State Prisoners

April 1, 1982

INTRODUCTION

Mr. Thurmond, members of the Committee, I wish to thank you for providing me with this opportunity to appear before this Committee to testify regarding S.2216, the administration's proposed amendments to curtail the availability of federal habeas corpus to state prisoners.

I am the Attorney-in-Charge, Appeals Division, Federal Defender Services Unit of the Legal Aid Society of New York. I have practiced in the federal courts for 14 years, handling appeals in criminal cases as well as many federal habeas corpus petitions by state prisoners. I am former Chairperson of the New York State Bar Association Committee on Indigents in the Criminal Process, and also serve as Chair of the Subcommittee on Habeas Corpus of the ABA Appellate Issues Committee of the Criminal Justice Section. I have testified several times before Congressional committees in the past, regarding proposed amendments to the federal Criminal Code (H.R. 1647 and 4711) and regarding the issue of appellate review of sentences.

The National Legal Aid and Defender Association (NLADA) is a national organization of programs and individuals providing legal assistance to poor persons. Among NLADA's membership are the great majority of defender offices, coordinated assigned counsel systems and legal aid societies in the United States. Its membership totals approximately

2,500 legal aid and defender programs and 1,000 individuals, including substantial numbers of private attorney and client community persons. NLADA speaks on behalf of defenders before Congress and other national policymaking organizations and agencies; files amicus curiae briefs in the U.S. and state Supreme Courts; provides technical assistance on defense services to local communities and offices; initiates training programs and publishes materials helpful to lawyers engaged in indigent criminal defense.

The Legal Aid Society represents the majority of indigent criminal defendants in municipal and state courts in the City of New York. The Federal Defender Services Unit of the Legal Aid Society is the federal defender for the U.S. District Court in the Eastern and Southern Districts of New York and the Second Circuit, U.S. Court of Appeals. The Unit handles many habeas corpus petitions by state prisoners in federal district courts and courts of appeal.

The Federal and Community Defender program represents those offices duly constituted under the provisions of the Criminal Justice Act, 18 U.S.C. 3006A. At present, 39 such offices represent nearly 23,000 persons a year in federal district courts and courts of appeal throughout the United States.

STATEMENT OF PHYLIS SKLOOT BAMBERGER
RELATING TO S.2216
BEFORE THE COMMITTEE ON THE JUDICIARY
OF THE UNITED STATES SENATE

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This submission will discuss the rationale offered for limiting access to federal courts by petitioners for writs of habeas corpus, will examine S.2216 before the Congress to curtail the availability of habeas corpus, and finally, will explore alternative suggestions for resolving the valid concerns involving habeas corpus.

I. Responses to the Rationale for Limiting Access to the Federal Courts on Habeas Corpus

S.2216 suggests radical changes in the availability of habeas corpus. The Notes of the Attorney General in support of the substantial proposed revisions refer in general terms to the often articulated reasons for urging limitation on the writ — that is, finality and comity. However, in addition, the Attorney General's Notes emphasize the philosophy that constitutional federalism is of greater significance than the constitutional rights of individuals. We attempt to respond to each of these contentions.

"Finality," in the context of this discussion, denotes the conclusion of all litigation brought by a prisoner relating to a conviction resulting in punishment. It is presumed by those who favor restricting federal habeas corpus availability that only when all litigation concerning the conviction is ended will the prisoner appreciate that he has violated the rules of society and commence efforts at rehabilitation; that public confidence in the criminal justice system will be maintained; and the possibility of a retrial which may not result in conviction will be averted.

"Comity" emphasizes the importance of allowing the state courts the first opportunity to examine the constitutionality of their own proceedings: federal examination may occur only if the state has had the first opportunity to determine the issue. Should the state actually examine the issue, deference is given to its factual determinations. Should the state court decline to examine the issue because valid state procedures were not followed in presenting it, federal examination is limited. Both comity and finality compete with the interest in correcting constitutional errors that have occurred in the criminal proceeding.

In the debate about whether the states will have their processes reviewed by federal courts in order to protect an individual's constitutional rights, proponents of restriction urge that the federal courts display a lack of respect for state court decisions by holding frequent hearings and overruling state court judges, and that a single federal judge may overrule all the judges of the state court system who have examined the case. Others argue further that state court judges are equally as competent as federal judges and are judicial officers who also have sworn to protect the Constitution.*

Pragmatic arguments are made for restricting access to the federal courts. Such claims are that habeas corpus litigation assumes too large a share of available federal judicial time and resources, that prisoners delay in filing their petitions until witnesses are lost, prejudicing the state in a retrial that may be unsuccessful.

We will refute these arguments for restricting habeas corpus.

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*See, e.g., Attorney General's Task Force Report on Violent Crime: Final Report at 58-59 (Aug. 1981); Testimony of Florida Senator Lawton Chiles before Senate Judiciary Subcommittee (Nov. 13, 1981).

A. Punishment is not generally delayed by the filing of petitions for writs of habeas corpus.

The idea that collateral proceedings inhibit swift and sure punishment for those convicted of crime is not accurate. With rare exceptions, the state collateral proceedings necessary to exhaust remedies* and federal habeas corpus petitions are brought by prisoners who are actually serving their terms of imprisonment and are subject to the rigors and limitations of the prison environment.** Indeed, one recurring problem with pro se prisoner petitions is that they do not make a clear presentation of the issues and fail to cite appropriate legal authority because of the limited skill of the writer and his limited access to legal material and assistance in prison.*

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*Before a constitutional challenge to a state conviction may be brought on federal habeas corpus, the petitioner must present his claim to the state courts. This can be done in the direct appellate process or by an independent proceeding called post-conviction remedy.

Whether an issue is properly raised on direct appeal or in a post-conviction remedy is determined by the status of the record. In most jurisdictions, if the factual issue is explored on the record of the trial, the appeal is the appropriate form in which to present the issue. If, however, additional factual information is required, a post-conviction remedy is used. Usually the post-conviction remedy is unavailable if the issue was or could have been presented on appeal. The post-conviction remedy is labeled either habeas corpus, in the nature of coram nobis, or by the number of the statutory section that authorizes the procedure (*e.g.*, in New York, a §440.10 motion (C.P.L. §440.10). See Yackle, POST-CONVICTION REMEDIES, *supra*, at Ch. 1 (hereinafter, "Yackle").

**See Robinson, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS 9 (Dept. of Justice 1979) (hereinafter "Robinson").

Obviously, the sentences of prisoners who are awaiting execution of the death penalty are delayed pending completion of the litigation. However, in these cases, too, the petitioner remains in custody.

B. There is no rational connection between custodial rehabilitation and the filing of petitions for writs of habeas corpus.

Proponents of limitations upon habeas corpus have argued that preparation and the pendency of habeas corpus petitions adversely affect rehabilitation of the prisoner. Whether or not prisoners are generally distracted from rehabilitation at prison during the preparation or pendency of habeas corpus petitions is a matter for speculation. There is no study or statistic which provides any basis for arguing that there is a cause and effect relationship; at present, such a conclusion is pure surmise.

However, the information available about custodial rehabilitation makes clear that rehabilitation is so far from being a realistic possibility in prisons in the United States that rehabilitation is an irrelevant factor in deciding whether to curb efforts to vindicate constitutional rights.

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*Compare American Bar Association, STANDARDS OF CRIMINAL JUSTICE, POST-CONVICTION REMEDIES, Standard 22-3.1 (2d ed. 1980) (hereinafter, "STANDARDS").

The judicial precedents establish that rehabilitation is not a realistic consideration in most American prisons. Many are uninhabitable and the courts have directed efforts to be made simply to make basic living conditions comply with constitutional standards prohibiting cruel and unusual punishment. The conditions are described in the dissenting opinion of Justice Blackmun in United States v. Bailey, 444 U.S. 394, 419 (1980), and concern about them is joined by other members of the Court (444 U.S. at 418). Justice Blackmun stated:

> The atrocities and inhuman conditions of prison life in America are almost unbelievable; surely they are nothing less than shocking.... A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail.... Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim. Prison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so given the limited resources society allocates to the prison system. Prison officials often are merely indifferent to serious health and safety needs of prisoners as well. Even more appalling is the fact that guards frequently participate in the brutalization of inmates. There can be no little question that our prisons are badly overcrowded and understaffed and that this in large point is the cause of many of the shortcomings of our penal system. This, however, does not excuse the failure to provide a place of confinement that meets minimal standards of safety and decency.
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> 444 U.S. at 420-424.

The inadequacy of conditions of confinement is shown by the fact that prisons or prison systems have been placed under court order because of conditions of confinement challenged as unconstitutional in twenty-four states,* Puerto Rico, the Virgin Islands, and the District of Columbia. Rhodes v. Chapman, 49 U.S.L.W. 4677, 4681 n.1 (S.Ct. June 15, 1981) (Brennan, J., dissenting). For example, a recent decision described the conditions at the maximum security unit at the Colorado State Penitentiary:

> Aside from the deficiency in cell size, the buildings where inmates live are in a serious state of disrepair and fail to meet minimal health and safety needs of the prisoners. For example, the roofs in the major cellhouses and the prison auditorium leak despite repair work.... Existing heating and ventilation systems are incapable of providing adequate temperature control and ventilation ... [and,] especially in the cells and shower areas, results in excessive odors, heat and humidity with the effect of creating stagnant air as well as excessive mold and fungus growth ... facilitating personal discomfort as well as health and sanitation problems.... Leaking pipes and defective plumbing cause sewage to accumulate in the cells.... [There is] an extensive problem with rodent and insect infestation.... Bath water in the shower areas remains impounded on the floors due to obstructed drains.... Metal strips sticking up through the floor along with exposed electrical wiring provide additional health hazards to inmates using the shower facilities.... [Bedding] is heavily stained and soiled and is not cleaned or changed when a new inmate is assigned to a cell.
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> Ramos v. Lamm, 639 F.2d 559, 569-570 (10th Cir. 1980), cert. denied, 101 S.Ct. 1759 (1981).

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*Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maryland, Mississippi, Missouri, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas.

The court concluded that these conditions alone rendered the prison unfit for habitation. It went on to describe the kitchen: water covering the floor, drains non-functional, rotting food on the floors, infestation with rodents and insects, floors covered with dirt and rodent droppings, food stored with mold (639 F.2d at 571, 572). The opinion also describes conditions of personal safety:

> The violence and fear which permeated the prison population ... in past years continues to exist. The efforts of many inmates are directed at merely staying alive while they serve their sentences. ... Prison records for 1978 and part of 1979 show a significant number of stabbings, assaults, fights, and threats.

In testimony before the Senate, prisoners similarly described conditions of physical safety at the Federal Penitentiary at Atlanta. Testimony before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 96th Cong., 2d Sess. (Aug.-Oct. 1978).

The conditions of confinement that precipitated the 1971 Attica riots are described in ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 21-102 (Bantam 1972).

In circumstances such as these, which prevail in many United States prisons, the denial of access to federal courts because rehabilitation might be inhibited is ludicrous. Indeed, recent studies of sentencing, particularly the indeterminate sentence (the goal of which is rehabilitation), led experts to question whether the rehabilitative goal is an appropriate one for determining the length of a prison sentence. The doubtful effectiveness of custodial rehabilitation has led many to question the indeterminate sentence:

> Thus, while we pour increasing numbers of people into prisons for the serving of uncertain sentences, the most basic of asserted justifications, the program of rehabilitation, is absent. In a host of cases, then, when somebody says a prisoner must be locked up because he is not "ready" for release, the ultimate Kafkaism is the lack of any definition of "ready." Facing the facts, we know that "treatment" is mostly an illusion in our prisons. There is powerful evidence that the majority of prisoners deteriorate — become poorer risks and lesser people — rather than improve in prison....
>
> Frankel, CRIMINAL SENTENCES:
> LAW WITHOUT ORDER 93 (1973).

Indeed, because the rehabilitation goal is not considered to be a predictable result of custody, the Committee on the Judiciary of the House of Representatives has adopted the position that rehabilitation not be a purpose of a custodial sentence but rather that custody be used to provide the opportunity for training and assistance. Report on the Criminal Code Revision Act of 1980 of the Committee on the Judiciary of the House of Representatives, Rep. No. 96-1396, 96th Cong., 2d Sess. at 436 (1980). The report is based on studies of custody and rehabilitation. Morris, THE FUTURE OF IMPRISONMENT 12-22 (U. of Chicago Press 1975) (hereinafter "Morris").

Whatever litigation may be the subject of the prisoner's attention, he or she must still be at least overtly participating in rehabilitative programs in order to earn good time credits, parole, furloughs, or work release. Conversely, the prisoner seeks to avoid administrative detention, segregation ("the hole"), and loss of good time and privileges such as family visits by obeying prison rules. These realistic concerns of one in custody generate rehabilitative conduct. See Morris, supra, at 17. Whether the system captures the mind of the man is not capable of general determination and should not be a factor in deciding whether he will be permitted to seek vindication of constitutional rights.

Finally, even assuming that rehabilitation is a realistic possibility, there is authority for the belief that the opportunity for a prisoner to express grievances in a formalized, structured manner before a neutral forum independent of his custodian is an important part not only of the rehabilitative process but instrumental in aiding prison discipline. Robinson at 4. The Supreme Court said in Bounds v. Smith, 430 U.S. 817, 831 (1977):

> ... Independent legal advisors can mediate or resolve administratively many prisoner complaints that would otherwise burden the courts, and can convince inmates that other grievances against the prison or the legal system are ill-founded, thereby facilitating rehabilitation by assuring the inmate that he has not been treated unfairly.

In Bounds, the Court notes the expert opinions, including the American Correctional Association and the National Sheriffs Association, favoring, as an aid to rehabilitation, prisoner access to the courts for resolution of legal questions. 430

U.S. at 829 n.18. Particularly enlightening is the report of a study of prison treatment by prison directors (Candarelli & Finkelstein, Correctional Administrators Assess the Adequacy and Impact of Prison Legal Services Programs in the United States, 65 Journal of Criminal Law & Criminology 91, 98-99 (1974):

> ... Although not unmindful of potential conflicts between the pursuit of legal remedies and a commitment to treatment channels, treatment directors appeared to conclude that prison legal services can have a substantial positive impact on rehabilitation. In contrast to the above-reported minority views, treatment directors were overwhelmingly (97 per cent) of the opinion that an inmate's eventual rehabilitation and successful reintegration into society are significantly affected by unresolved legal problems, and that such unresolved legal problems are an impediment to effective participation in treatment programs. Respondents also pointed out that outstanding warrants and detainers made it very difficult for inmates to engage in productive post-release planning.
>
> Furthermore, 97 per cent of the treatment directors believe that negative inmate attitudes toward law and the legal process are a detriment to rehabilitation and that a good legal services program might improve such attitudes.... Overall, our results show that most treatment directors not only view legal services for inmates as an integral component of corrections, but as a necessary adjunct to rehabilitation.
>
> . . .
>
> Although research into the question of legal services and rehabilitation has not been extensive, the experience of many persons associated with prison legal aid programs has, according to Silverberg, confirmed the belief that "clarification of

> the legal process as it has been applied to him [the inmate] ... removes festering doubts in many cases and may help set a man's sights on rehabilitation rather than revenge."

(Emphasis in the original.)

C. Difficulties in retrial are not caused by habeas corpus.

The belief that it would be difficult to retry a case in which a writ is granted long after the first conviction is a continuously weakening argument. First, it must be noted that only a few writs are granted each year (see *infra*). Next, retrials in cases in which writs are granted are often delayed by the state's own appeal of the order or its opposition to the petitioner's appeal if the writ is denied even in those cases in which error should be conceded and the matter returned to the state courts for retrial. See *LaBelle* v. *Mancusi*, 404 F.2d 690 (2d Cir. 1968), where Judge Lumbard, angered at the State's opposition to issuance of the writ, ordered issuance of the writ in open court to avoid further delay in retrial.

Third, transcription of the minutes of trial and the preservation of testimony on audio and videotape, if not yet regularized in all jurisdictions, are becoming normal practices in many courts. These methods of recordkeeping, as well as carefully formulated rules of evidence for the conditional admission of these kinds of records, prevent prejudice to the state should witnesses or their memories become unavailable for use at a second trial. See, e.g., Fed. R.Ev. 804(a)(3) and (4).

D. The extent of federal involvement in state criminal cases is minimal.

In 1980, 4.5 million criminal cases were disposed of by courts of general and limited jurisdiction.*

In fiscal year 1981, 7,790 habeas corpus petitions were filed by state prisoners in the federal courts.** Administrative Office of the United States Courts, REPORT OF THE DIRECTOR, Table 21 at 63 (1981) (hereinafter, "1981 Report"). This figure is compared to a total civil filing in federal district courts of 180,576 cases (1981 Report, Table 20 at 63).

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*Sourcebook on Criminal Justice Statistics at 404-401 (1981).

**Habeas corpus filings since 1970 are as follows:

1970 — 9,063
1971 — 8,372
1972 — 7,949
1973 — 7,784
1974 — 7,626
1975 — 7,843
1976 — 7,833
1977 — 6,866
1978 — 7,033
1979 — 7,123
1980 — 7,031

1981 Report, Table 21 at 63;
1975 Report, Table 24.

The increase noted in prisoner filings in the narrative part of the 1981 Report is due to the increase in civil rights filings, which from 1975 to 1981 increased by 155.2%. In that period, habeas corpus filings decreased by .7%.

By Circuit, the filings of petitions for writs of habeas corpus are as follows:

First Circuit — 125
Second Circuit — 663
Third Circuit — 484
Fourth Circuit — 1,104
Fifth Circuit — 2,348
Sixth Circuit — 860
Seventh Circuit - 658
Eighth Circuit — 373
Ninth Circuit — 851
Tenth Circuit — 300

The largest number of petitions was filed in the district courts of Texas (746), Florida (601), and Georgia (280).

It is a revealing comparison, too, to note the number of habeas corpus petitions filed in comparison with the number of cases filed in federal courts during the same period based on diversity of citizenship. Diversity cases filed were approximately 60,000.*

Case dispositions in the federal courts also demonstrate that the number of habeas corpus cases is small. In fiscal year 1981, 177,925 civil cases were terminated in the federal courts (1981 Report, Table 36 at 85; Table CA at A-26). Of these, 100,810 were terminated with court action; 11,416 were completed during or after trial (1981 Report, Table CA at A-26). The number of terminated diversity cases was 39,368; 22,846 involved court action, and 4,439 involved a trial (1981 Report, Table CA at A-27). Compare these figures to habeas corpus cases filed by state prisoners: 7,302 were terminated, 6,834 with court action with only 165 hearings before district courts (1981 Report, Table CA at A-26) and 243 before United States magistrates (1981 Report, Table M-5 at A-154). The 165 figure includes not only evidentiary hearings, but also legal proceedings in which only legal argument by counsel was conducted.**

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*This figure is derived from comparing categories of diversity cases terminated in 1981 Report Table CR at A.27 with the same categories included in 1981 Report Table 19.

**This information comes from the Administrative Office of the United States Courts. See also Shapiro, supra, 87 Harv. L. Rev. at 333.

Thus, habeas corpus matters constituted 1.3% of civil hearings held by district courts in 1981, and hearings were held in 5.75% of the habeas corpus cases terminated.

Further, according to the 1981 report, habeas corpus hearings occupied comparatively minimal district court time. The total number of cases tried, including petitions brought by federal prisoners pursuant to 28 U.S.C. §2241 (to challenge sentence computation, parole board decisions, and conditions of confinement) was 204. (This does not conflict with the earlier cited number of 165, which consists of only state prisoner petitions.) Of these, 158 took one day to try, 26 took two days, ten took three days, nine took four to nine days. 1981 Report, Table C8 at A-40. The comparison in the same table to other civil cases demonstrates that the assertion that inappropriate amounts of time are spent in habeas corpus cases is without basis in fact.

Thus, it can readily be seen that devotion of in-court time to the constitutional claims raised by habeas corpus cases is comparatively insignificant. There are no statistics to show the amount of out-of-court time spent on examination of petitions for the writ. However, it is quite clear that two factors are significant to this time period: first, the cooperation of state officials in supplying the record; second, the assignment of counsel to represent the petitioner. Similarly, it is clear that hearings are not irrationally or improperly undertaken by federal judges. Available data show the same restrained consideration given to the granting of writs. In 1971, the number of petitions in which requested relief was denied was 96% (Shapiro, supra, 87 Harv.L.Rev. at 333). It appears that this number remained approximately constant into 1977 (Robinson at 4(c)). Available evidence also demonstrates that the leading ground for dismissal of habeas corpus petitions is the petitioner's failure to exhaust state remedies and other procedural defects (Shapiro at 334; Robinson at 4(b), 13, 31). This is a clear indication that care was given to protect the states' interests in deciding the issues.

Although habeas corpus writs have had an impact on the courts, less investment of judicial time is required to process these petitions than to preside over traditional lawsuits (Robinson at 4(b)). It does not appear that the current caseload is disproportionately great on the federal courts, either absolutely or in the light of other kinds of cases before those courts and the number of criminal cases processed in the states. Indeed, the number of habeas corpus cases is small and the amount of federal judicial time appears, from the statistics, minimal, while the constitutional issues determined in these cases are often of compelling significance.

It should also be noted that while the number of writs granted is small, the mere filing of a petition, especially if counsel is appointed, often produces a favorable result, even if the result is not court-ordered relief. When a state concedes that its custody of a petitioner is wrong or that some other error permitting relief has occurred (Shapiro at 338; Robinson at 24), the purpose of the writ is satisfied. Furthermore, the studies note that appointment of counsel expedites the process, and affirmatively assists in obtaining relief and in eliminating procedural defects so as to avoid wasted judicial effort (Robinson at 53-55).

The importance of maintaining access to the federal courts for interpretation and application of the United States Constitution is just as critical, if not more so, than retaining access for diversity jurisdiction cases involving only damage claims under state law. The press to bar federal habeas corpus availability to state prisoners should be reconsidered.

E. The interim for federal habeas corpus is not an unjustified delay caused by petitioners.

Opponents of the habeas corpus proceeding have asserted that petitioners deliberately delay filing their federal petitions so that, if the petition succeeds and a new trial is ordered, the state will have lost the ability to conduct a retrial. There are no supporting data for this claim; indeed, there does not appear to be any evidence upon which to conclude that late filings are deliberate efforts to sabotage further state proceedings. The empirical data that exist show that, far from fostering most delay, prisoners file their petitions as soon as they believe it is appropriate for them to do so. Rationally, this is the only approach for a prisoner whose primary concern is his release from custody.

Of course, the filing of the federal petition must be postponed until completion of the state appellate and post-conviction proceedings necessary to satisfy the requirement of exhaustion of state remedies. In one study, the mean length of time involved in pursuing direct appeals of criminal cases in state courts varied from 10 to 31 months. Wasby, et al., VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES 29-32 (National Center for State Courts 1979).* In 1981, a study was published involving six appellate courts and 5,900 direct appeals filed in 1975 and 1976. The average time from the lower court judgment to issuance of the appellate mandate was from 240 days to 648 days. APPELLATE COURT DELAY 86 (National Center for State Courts 1981).** Because many issues cannot be raised in state court on direct appeal, but must be presented on post-conviction relief in order to expand the record, the interim approximate time needed to complete an appeal and/or a post-conviction proceeding must accommodate this requirement.*** The exhaustion requirement may compound delay if the petition is procedurally defective and the case is returned to the state courts.**** See Robinson at 17.

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*Twenty-nine states were reviewed for a given length of time between 1975 and 1977.

**The actual time involved in the six appellate courts was 240, 330, 332, 369, 378, 413, 431, 484, 641, and 648 days in criminal and civil appeals.

***In those jurisdictions which have adopted the Uniform Post-Conviction Procedures Act, the direct appeal may be held in abeyance until the collateral attack is complete and then, if necessary, the appeals are consolidated. In others, post-conviction relief must await completion of the direct appellate process.

****Under Wainwright v. Sykes, 443 U.S. 72 (1977), the federal court must first determine whether there is an available state remedy and, if not, whether there has been a procedural by-pass.

Nonetheless, in the Robinson study, Table 15 at 42 and 43, it was found that petitions were filed in federal courts on an average of three years after conviction. In the six federal district courts studied, it was found that petitions were filed between 669 and 1,296 days after conviction. Of course, some time is required for disposition of the matter before the federal district court and on the federal appeal, if one is taken. See Robinson, Table 15 at 43, and 42-46; Shapiro, Table III at 333; 1981 Report, Table C5B at A.32.

Some petitions are filed beyond the average time. However, there are often sound reasons for the delay, including the noted procedural requirements, incompetency, illiteracy, ignorance, inability to prepare the papers, lack of access to legal materials or state court records, or control over filing by the state prison officials.

F. Judicial review of state court decisions by a single federal judge occurs only if the state permits.

The assertion has been made that a single federal judge may override the decisions of the collected state judiciary. While this is theoretically possible, it occurs only when a petition succeeds and the state takes no further action. Under the applicable statutes, a federal district judge's decision may be appealed by a state as of right — that is, without the discretionary certificate of reasonable doubt. Thus, a decision by a federal district judge is automatically reviewable by a three-judge panel of a federal appeals court if the state files and perfects an appeal. On the other hand, a petitioner who seeks review may proceed only by permission of the district court or the court of appeals. The cry of "foul" on this score is simply unjustified. A state also has available to it the remedy of seeking en banc consideration of its position by a federal court of appeals and review by the United States Supreme Court.

G. Comity interests are fully protected.

Recent decisions from the Supreme Court leave no doubt that the states' interests in first determining the constitutional issues raised are fully protected. The same issue presented to the federal court must first have been argued to the state court. Picard v. Connor 404 U.S. 270 (1971). The fact findings of the state court, whether trial or appellate, are given deference under §2254(d). Sumner v. Mata, 49 U.S.L.W. 4133 (S.Ct. Jan 21, 1981). If more than one claim is presented to the federal court, all must have first been raised before the state court. Rose v. Lundy, 50 U.S.L.W. 4272 (S.Ct. March 3, 1982). By-pass of a state procedural rule is a bar to federal litigation. Wainwright v. Sykes, 433 U.S. 72 (1977).

Thus, state interests in comity do not justify legislation or merit concern.

H. The preclusion of federal court protection of constitutional rights should be rejected as a basis for modification of habeas corpus jurisdiction.

The step beyond having the state courts make the primary determination on constitutional issues is to have the state court make the only decision. It is this interest which appears to have provided the doctrinal basis for S.2216. It must be noted that it was not states which urged this federal withdrawal upon the Congress (See S.636), but the Attorney General of the United States. The Notes of the Attorney General state that the federal review after a state decision defies common sense and sound judicial policy, that federal review seldom produces a different result, that we want to make the state judges "who do rise to the occasion" strong and independent, that the origin of federal review confirms its "arbitrary nature," and that the current statutes do not explicitly authorize federal examination of the issues (Attorney General's notes at 33-35).

None of these explanations would support a Congressional policy of preclusion of federal court review of constitutional issues.

That writs are granted in only a small number of cases does not justify preventing federal examination of the issues. In those cases, an individual was held in custody in violation of his constitutional rights; state courts had refused to correct a violation of those rights and the wronged individual obtained his relief only through the federal courts. Minimizing the importance of the decisions granting writs distorts the significance of the rights granted by the constitution and the people they were intended to protect.

From experience, the rights involved in habeas corpus cases in which writs were granted were substantial guarantees including the right to counsel, the right to a jury trial, and the right to an impartial jury.

Perhaps the most controversial aspect of the right of federal examination is whether the examination connotes a negative impression of state judges. Historically, state judges and state court structures were not responsive to claims of constitutional violation. This circumstance is what produced the 1963 decision in *Fay* v. *Noia*, 372 U.S. 391. *Fay* was written because many states had provided no means, or supplied only defective ones, for the presentation and consideration by state courts of federal constitutional claims. The response of many states in the years following was to enact statutes which provided post-conviction remedies for the presentation of such claims. Now, almost all states have some form of post-conviction remedy for the presentation of claims which cannot be raised on appeal.

However, the effectiveness and fairness of many of these statutes enabling a petitioner to make prompt and effective presentation of his claim is not established and even if theoretically clear, may not be so applied in specific cases. See, e.g., Wilkes, *Postconviction Relief in Georgia: A Decade after the Habeas Corpus Act*, 12 Ga.L.Rev. 249 (1978); Anderson, *Post-*

Conviction Relief in Tennessee, 48 Tenn.L.Rev. 605 (1981). There is concern that as federal oversight of constitutional decisions diminishes so will the newly developed state court attention to them.

As for individual state judge's responses to constitutional claims, it is probable that those responses vary depending on personal preferences or prejudices. However, state court judges are elected or appointed for a term of years. They are subjected to pressures of the press, public opinion (rightly aroused or not) or the person or institution that appoints or nominates them. In difficult cases there is sometimes at least an appearance of influence. In many jurisdictions appellate review of this single state trial judge is discretionary, or done perfunctorily on abbreviated appeal procedures without written opinions. Newborne, The Myth of Parity, 90 Harv.L.Rev. 1105 (1977). Federal judges because of their lifetime tenure are not as vulnerable to the community of pressures.

While the Attorney General's notes rely extensively on the 1963 article by Professor Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv.L.Rev. 441, no note is taken of a later article by Professor Bator. The State Courts and Federal Constitutional Litigation, 22 William & Mary 605, 626 (1980). In the article, the "full and fair opportunity" formula, urged in S.2216 is advocated. But

Professor Bator acknowledges that it does not at all reach the question of competence and sensitivity to constitutional issues, but he urges that we think about the long run:

> One can well understand the plea of civil rights plaintiffs' lawyers that they should be allowed access to the federal courts because that is where they will find juster justice. But the plea cannot in itself be decisive to those, legislators and judges, charged with the task of designing and implementing a system of remedial and jurisdictional rules. They must think of tomorrow as well as today; they must resist an exclusive fixation on the immediate case.
>
> Id. at 627.

This suggestion creates grave doubts as to the level of constitutional protection which will be afforded without federal oversight. While it is important to have a system which works, we are already possessed of a system which does work while protecting individual rights. Only some crying need, not yet demonstrated by the advocates of federalism, should compel federal abandonment or protection of individual constitutional rights. It never hurts to have someone looking.

The second examination by a federal court does not at all defy common sense or judicial policy. To the contrary, it is consistent with the goals of constitutional protection.

II. The Proposed Legislation

The matters now to be discussed are raised by the proposals to amend 28 U.S.C. §2254, the federal habeas corpus remedy for state prisoners. There are presently pending before the Senate S.653 and S.2216. We comment on S.2216. The proposed legislation contains numerous provisions:

1. The proposal sets out what will constitute a procedural by-pass, *i.e.*, a failure to follow state procedures for raising a federal constitutional issue in state courts so as to bar presentation of the issue in federal courts. They also set forth what circumstances will excuse the by-pass.
2. The proposal establishes a one-year statute of limitations for bringing the writ.
3. The proposal limits federal court relitigation and redetermination of questions of law and mixed law and fact questions.
4. The proposal changes the test for federal evaluation of findings of fact.
5. The proposal changes the appeal procedure.

A. Procedural by-pass, cause, and prejudice

S.2216 would bar federal court consideration of constitutional issues which have not been presented to the states in accord with state procedures, and it enumerates the circumstances which would excuse such procedural by-pass. Inspiration for this proposal came from Wainwright v. Sykes, 433 U.S. 72 (1977). Under Sykes, a constitutional issue not raised in state courts in accord with a state's contemporaneous objection rule (and for that reason not considered by the state courts) is deemed forfeited. The federal courts are not permitted to examine the issue because the state courts have declined to do so for a justifiable state ground. The theory is that the required adherence to a procedure — in Sykes, the contemporaneous objection rule — would enable the state trial judge to correct an error when the trial or proceedings are still in progress. It is at this time that witnesses' recollections are freshest or that the objection might result in an immediate decision favorable to the defendant and end the case, or that it might force the prosecutor to reconsider the viability of his case (Id., 433 U.S. at 88-89). The critical consideration is that the state's rule not be arbitrary or calculated to discourage the claim, but necessary to protect its interests in curing mistakes in timely fashion as they arise. Under Sykes, a state rule of procedure must be helpful to the legitimate state purpose of enabling a state to prevent or correct errors:

> ... Society's resources have been concentrated at that time and place in order to decide within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous objection rule surely falls within this classification.
>
> 433 U.S. at 90.

In Sykes, the Court stated that exceptions to the by-pass rule were to be premised upon the cause for the failure to raise the issue and the prejudice arising from the claimed constitutional defect. Both cause and prejudice were left undefined, matters to be explored in future cases.

We recommend that no statute touching on matters of by-pass be enacted. The Sykes decision is a substantial withdrawal from the prior controlling principle established in Fay v. Noia, 372 U.S. 391 (1963). Under Fay, federal courts were barred from consideration of a constitutional issue by the petitioner's failure to raise it in a state forum when the issue was knowingly and voluntarily relinquished. Under Sykes, the federal courts should be free to determine whether a state procedural rule serves a valid purpose such as helping to correct trial errors, or is merely an arbitrary method of inhibiting or preventing presentation of issues to the state courts. Further, the federal courts must be able to determine whether the procedures are so cumbersome and unclear, or so difficult to meet, or so restrictive that a state's refusal to consider a constitutional issue because of the failure to comply with state procedures is simply arbitrary.

Furthermore, statutory definition of cause and prejudice is inappropriate. The Sykes standard is a new one and, given the variety of factual circumstances ~~that are~~ presented in habeas corpus petitions, it is appropriate to permit courts to decide if a specific by-pass is justified by the circumstances of the case. An attempt to define cause and prejudice at this stage may prevent relief in appropriate but unforeseen circumstances.

Section 2 of S.2216 would bar federal consideration of a claim not raised "in state proceedings at the time or in the manner required by state rules of procedure." The function of such a rule is ostensibly to preserve the interests of comity. However, this provision goes beyond the Sykes decision and beyond interests of comity. State rules of procedure requiring that claims be made in specific ways and times may nevertheless include statutory or judicial exceptions. For example, in some states an issue not objected to at trial in accord with a procedural rule may nonetheless be raised on appeal to the state appellate courts (e.g., New York Criminal Procedure Law §470.15; People v. McLucas, 15 N.Y.2d 167 (1965); People v. Arthur, 22 N.Y.2d 325 (1969)). Should the issue be raised on appeal and not specifically be rejected on procedural by-pass grounds, it serves no legitimate state interest to decline consideration of the issue in the federal courts on grounds that the issue was not raised in accord with a rule of procedure. Indeed, decisions of the Supreme Court make clear that actual consideration by the state courts is not the standard for evaluating by-pass, but whether the state has been given an opportunity to determine the issue. Smith v. Digmon, 434 U.S. 332 (1978); Yackle at §63 at 257.* The proposed legislation would bar federal consideration of a constitutional issue which was properly before the state courts and would deny federal review when the state itself has, as a matter of policy, chosen to make the issue a reviewable one.

Section 2 then goes on to list three "causes" for the failure to comply with state procedural rules. The first is "the failure to raise the claim properly or to have it heard in state proceedings [which] was the result of state action in violation fo the Constitution or laws of the United States." The Attorney General's notes relating to this proposal state that the issue of cause should be concerned with whether the state provided an opportunity to present the federal claim consistent with federal law. It is unnecessary to enact this bill to include the principle because it is inherent in Sykes, which, as noted, requires that state rules of procedure be rational and reasonable. In fact, the proposal has nothing whatever to do with cause, but rather relates to the initial question of whether there has been a valid state rule that has been bypassed.

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*The opportunity to consider the issue is presented by the presentation of the claim. Because many decisions are rendered by appellate courts without an opinion, they do not disclose whether the issue was specifically rejected because of procedural error.

What the proposal does is to eliminate every valid reason justifying a failure to comply with state procedural rules. Most significantly, it precludes any claim that counsel's conduct was the improper cause of the by-pass. It is incorrect to assert that the language of the proposals would permit a petitioner to urge as cause the Sixth Amendment-incompetency of counsel standard. The language of the bill requires state action, but the Supreme Court has said in clear and unequivocal language that the conduct of counsel — either retained or assigned — is not state action. Polk County v. Dodson, 50 U.S.L.W. 4077 (S.Ct. Dec. 14, 1981). The proposal thus precludes a claim that counsel's incompetence resulted in a failure properly to raise an issue in state court.

Furthermore, the limitation of the test of counsel's conduct to Sixth Amendment incompetence is inappropriate in the context of the realities of practice in criminal cases. The issue of counsel's competence under the Sixth Amendment is properly raised on direct appeal (based on factors in the trial record) or on collateral attack (based on factors outside the record). It is itself an issue considered on habeas corpus, and counsel's competence is evaluated by judging his performance throughout the trial. However, what is crucial to "cause" is counsel's performance with respect to the particular constitutional issue which was not properly presented and this limited examination of counsel's performance should be the relevant factor when "cause" is the question. To impose the identical test for determining both the adequacy of counsel's total performance when the basic claim is incompetence, and "cause" when the basic claim is premised on some other constitutional violation, reduces all the issues to one of counsel's incompetence. Such a result makes no sense if there is a genuine concern for protecting the petitioner against all constitutional violations.

In addition, it is clear that, under a strict forfeiture rule (which is imposed by Sykes), the lawyer's ability becomes even more significant than it would be if the Fay v. Noia waiver standard were in effect. Because counsel's conduct is binding upon his client, counsel's responsibility is not limited to informing the client of rights but must include action based on informed decisionmaking. Under Sykes, it is more crucial that the conduct be based on knowledge of law and facts than it would be if his actions were binding only if strategically made as it was under Noia. Trial rights, in large measure, are protected by counsel, and it is expected that the client will rely on his attorney's decisions:

> Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate — and ultimate — responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client. The trial process simply does not permit the type of

> frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad myriad tactical decisions as a trial proceeds.
>
> Wainwright v. Sykes, supra, 443 U.S. at 93 (Burger, Ch.J., concurring; footnotes omitted).

In these circumstances, counsel's decisions on particular issues should not be binding if the result of ignorance or negligence. Attorneys have met with substantial criticism of their in-court performance. Burger, The Special Skills of Advocacy, 42 Ford. L. Rev. 227 (1973); Kaufman, Continuing the Call for Courtroom Competence, 64 A.B.A.J. 1626 (1978). The defects in performance make it both necessary and salutary to consider counsel's treatement of the particular issue raised in the "cause" category.

Application of the Sixth Amendment standard of competence will also have the anomalous effect of producing different results on constitutional issues in different federal courts. The result will occur because standards for competence vary from Circuit to Circuit. Thus, for example, if counsel fails to object to a constitutionally-deficient instruction to the jury, and "cause" is determined by whether counsel's conduct was competent under the Sixth Amendment, his conduct may be tested as whether it made the whole trial a sham and mockery (United States v. Alessi, 638 F.2d 466, 477 (2d Cir. 1980); whether, on the whole, there was reasonably competent assistance (United

States v. Miller, 643 F.2d 713, 714 (10th Cir. 1981); or whether the overall defense was reasonably competent (United States v. Thomann, 609 F.2d 560, 566-567 (1st Cir. 1979). If the test urged by the Attorney General were to be used, each of these tests for cause might require a different result even though the asserted constitutional error was the same.

This "cause" proposal, resting on state action, precludes federal presentation of claims which, because of the unique facts of a particular case, cannot be presented at the state court trial. Among such issues are trial counsel's incompetence and counsel's conflict of interest. These questions will almost never be raised at trial: counsel himself will not raise them; the trial judge is unlikely to do so sua sponte and, at least in the conflict situation, need not raise them unless he is aware of them. Cuyler v. Sullivan, 446 U.S. 335 (1980). The defendant is unlikely to be sufficiently familiar with the law to raise the issue himself. Further, a claim by the defendant that his lawyer is not properly representing him is often barred by state judges, who will not hear pro se applications by a defendant who has counsel, or who will compel a defendant either to proceed with counsel the defendant believes to be incompetent or to proceed pro se.

Also discounted by the notes is the established principle requiring that the defendant himself affirmatively waive, on the record, basic and fundamental rights such as the right to counsel, the right to a jury trial, the right to a public trial, and the right to pursue an authorized appeal. See Johnson v. Zerbst, 304 U.S. 458 (1938). Basic rights such as these, says the Attorney General, may be denied vindication in the federal courts only if state action is involved. Such a test is obviously a substantial modification of the present law and should not be undertaken at all. For example, the proposed change would permit an attorney to enter a guilty plea on behalf of a client who has not consented to such a procedure, or to permit counsel to waive a jury trial without his client's consent or knowledge of such right.

There are no specific objections to the causes defined in (2) and (3) of Section 2 of the bill except that they are obviously intended to be exclusive and, as such, the list of "causes" is inadequate. No list of reasons for cause can be exclusive; the potential for variation of facts and circumstances is unlimited. For example, "cause" should include suppression of evidence by prosecutorial authorities, judicial officers, and any government or public official. It should include inadvertent or negligent failure to disclose, as well as intentional suppression. It should encompass the defendant's mental status and language facility and should include his failure to comprehend the significance of factual events. This subject is the kind traditionally left to the courts to adjudicate on a case-by-case basis. Such a position is appropriate here.

To summarize, Section 2 restricts habeas corpus beyond interests of comity, and therefore is unjustifiable. It restricts the cause for failure to follow state procedural rules in ways that are unconstitutional, that do not protect defendants against the inadquacies of their lawyer's performance, and that do not accord with the realities of the criminal process as experienced daily by defense counsel.

B. Statute of limitations

Section 2 of S.2216 includes a one-year statute of limitations with specific triggering dates. The defects in the proposed statute will be outlined below.

Imposition of a statute of limitations is unconstitutional. Article I, Paragraph 9, Clause 2 of the Constitution states: "The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it." A statute of limitations constitutes a legislative-executive direction barring the courts from considering the constitutionality of custody after expiration of the relevant time period. Jones v. Cunningham, 371 U.S. 236, 238 (1963); Johnson v. Eisentrager, 339 U.S. 763 (1950) (Black, J., dissenting); Sanders v. United States, 373 U.S. 1, 11-12 (1963); United States v. Heyman, 342 U.S. 205 (1952). As such it is contrary to the Constitution.

The Attorney General's Notes (at 17, n.27), find no constitutional problem in light of the statutory origin of habeas corpus jurisdiction over state prisoners. This position appears to argue that Congressional action to apply the provisions of the Constitution is not worthy of serious consideration. To the contrary, the constitutional assurance of the habeas corpus remedy applies to state prisoners, and as such the remedy itself may not be limited in violation of the constitutional provision relating to it.

The theory for prohibiting suspension of the writ is that illegal detention based on a valid claim of constitutional error is a continuing illegality* and the detention itself is the improper official conduct to be concluded by a final order of release issued pursuant to the writ. Because the official illegality is a continuing one, no statute of limitations can apply, just as a statute of limitations does not prevent prosecution of a continuing crime.

The Congress and the courts have previously rejected application of a statutory time bar. The United States Supreme Court has declined to find time-barred a petition for a writ of habeas corpus simply because of the number of years that have intervened since the conviction. See Uveges v. Pennsylvania, 335 U.S. 437 (1948); Palmer v. Ashe, 342 U.S. 134 (1951); Herman v. Cloudy, 350 U.S. 116 (1955). In Cloudy, the Court said that "... petitioner [was not] barred from presenting his challenge to the conviction because eight years had passed before this action was commenced." Referring to Uveges and Palmer, the Court said, "[t]he sound premise upon which these holdings rested is that men incarcerated in flagrant violation of their constitutional rights have a remedy." Id., 350 U.S. at 123. Finally, in Heflin v. United States, 358 U.S. 415, 420 (1959) (Stewart, J.), it was noted that no statute of limitations barred habeas corpus.

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*Without citation, the Government argues that some unnamed people claim that a statute of limitations is precluded by the constitutional nature of the rights asserted (Attorney General's Notes at 15-16). It is then asserted that the argument is misconceived. The weakness in the Government's position favoring a statute of limitations is demonstrated by its reliance on such straw men.

In 1976, the Judicial Conference of the United States proposed Rule 9(a) for habeas corpus proceedings which called not for a time bar but for a rebuttable presumption that a state was prejudiced by the filing of a habeas corpus petition more than five years after conviction. Pursuant to this proposed rule, the burden would have been on the petitioner to rebut the presumption of prejudice.*

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*Information concerning the Proposed Rule 9(a) comes from the Advisory Committee Note to Rule 9(a). However, it is critical to realize that the note does not relate to the Rule as it was finally promulgated. The rule finally adopted was substantially different from the one proposed, but the note remained unchanged.

The House Committee on the Judiciary found the rebuttable presumption unacceptable, and adopted a more traditional approach requiring the state to plead prejudice and the petitioner to respond that he was unaware of the grounds for his challenge prior to the circumstances that prejudiced the state. A decision by the federal court to preclude consideration of the petition is discretionary, permitting the writ to be granted if justice requires. (H.R. Rep. No. 94-1471 at 5 (Sept. 2, 1976), reprinted at 3 U.S.C. Cong. & Admin. News at 2478 (1976); see Davis v. Adult Parole Authority, 610 F.2d 410 (6th Cir. 1979).

The provision of Rule 9(a) is not a suspension, for the length of time alone does not permit a dismissal. Rather, dismissal is to be examined in light of the circumstances: prejudice to the state, the cause for the petitioner's delay, and the seriousness of the claimed error. Thus, the circumstances in a particular case may justify denial of the writ, but not its suspension or bar.

The Government's argument (Attorney General's Notes at 15) is that Rule 9(a) is inadequate because it does not permit consideration of the effect of delay on retrial; for example, the loss of a witness. If the Government's position is premised on the assumption that a delayed filing is deliberate for the purpose of avoiding retrial, it may simply be said that there is no evidence of such deliberate withholding. The American Bar Association, which opposes imposition of a statute of limitations for collateral proceedings as unsound

(ABA STANDARDS FOR CRIMINAL JUSTICE, Standards for Post Conviction Remedies 22-2.4 (2d ed. 1980), explains that there is an absence of data to support the idea that the remedy is abused by intentional withholding of claims. The Standard suggests that if such abuse exists, it may be dealt with by denying relief to those petitioners who deliberately or inexcusably withhold their request for relief until an event occurs that prevents reprosecution.

The argument of deliberate withholding is illogical. A prisoner is interested in obtaining his release as quickly as possible, and would not delay filing to avoid retrial. In addition, it is almost impossible for an inmate to learn when a crucial piece of evidence against him is lost or a witness against him has died or is otherwise unavailable.

Another argument made by proponents of a time bar is that delayed writs, regardless of intent, make retrial difficult. However, as noted ante at 17, delays in filing habeas corpus petititions are often the result of observing exhaustion requirements. Obviously, there is an inconsistency between the exhaustion requirement and reduced time between conviction and filing the habeas corpus petition. The proposed statute of limitations would not reduce this required time. One appropriate response to unnecessary delay in habeas corpus cases is the expeditious processing of state appellate and post-conviction remedies. Also, as previously discussed, new methods for preserving testimony by audio-visual mechanisms provide a means by which prosecutors can preserve evidence. Revised rules of evidence permit use of such evidence if witnesses or their memories are lost. The problem of loss of evidence is minimally significant for any case currently or recently tried or to be tried in the future.

The proposal provides that a petition must be filed within one year after exhaustion of state remedies, after termination of unconstitutional state action that prevents filing, after recognition of a federal right, or after the time the facts that form the basis of the claim were discovered by reasonable diligence. The proposal (see Attorney General's Notes at 21) is not feasible after the decision in Rose v. Lundy, 50 U.S.L.W. 4272 (S.Ct. March 3, 1982). In Rose, the Court held that joining of exhausted and unexhausted claims in a single petition requires dismissal of the petition, and either its withdrawal until all claims are exhausted or amendment of the petition to strike the unexhausted claims. A minority of the Court warned that a petitioner who adopted the latter strategy, necessitating the filing of two petitions, ran the risk of dismissal of the second application as successive under 28 U.S.C. §2254, Rule 9(b) of the Rules for §2254 Proceedings, and Sanders v. United States, 373 U.S. 1 (1963).

Pursuant to the proposal, a petitioner may have presented some of his claims to the state courts on direct appeal, thereby exhausting those issues. He may also have claims that are properly presented to the state courts only on post-conviction remedies which, in some states, may not be filed until completion of the direct appeal. In these circumstnaces, exhaustion may be completed at widely disparate times. However, the Government's proposal would require presentation of each claim within a year of its exhaustion. The petitioner would thus be forced to file successive petitions. The result of such a scheme is obvious: if a petitioner waits to exhaust all his claims, the proposed statute of limitations would bar presentation of those issues first exhausted; if he files successive petitions as issues mature, his later exhausted claims may be dismissed.

In addition to this substantial problem, any time limit, especially the one fixed here, connotes a failure to appreciate the practical circumstances with which litigants in habeas corpus cases are involved. Indeed, the proposal of a one-year time bar can be made seriously only in ignorance of the conditions under which most petitioners live. Virtually all habeas corpus petitioners are prisoners. Many are illiterate, ignorant, and confused. Some are retarded, mentally ill, insane, or physically incapacited. To them, the legal system is an unintelligible morass. Indeed, concepts of by-pass, forfeiture, waiver, and exhaustion, as well as the underlying substantive claims, are complicated ideas. For most, no lawyer or legal program is available. Although states do provide counsel for a direct intermediate appeal, no counsel is required for discretionary appeals or for state post-conviction procedures. Thus, the prisoner must prepare his case on his own or with whatever haphazard assistance he may obtain from a jailhouse lawyer. Prison law libraries are often lacking the basic volumes necessary for minimal research, but even if books are available, access to libraries is strictly controlled and limited by prison regulations. Legal documents and books are frequently taken from prisoners in cell searches and shakedowns conducted in the name of prison security.* Often, a prisoner's legal work is destroyed or stolen by other inmates. Finally, one of the most devastating effects of prison disturbances on all inmates, whether participants or not, is the wholesale destruction of personal property, including legal papers, by inmates and guards.

Additional problems continually affect inmates' opportunity to prepare legal papers for filing in the federal courts. Frequently state court records, essential to prepare legally sufficient papers, are interminably delayed by state courts and prosecutors.** Mail to and from persons outside the institution, with information relevant to the legal proceedings, may be censored or confiscated, again in the interests of prison security.

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*None of thes circumstances constitute unconstitutional state action (Bell v. Wolfish, 441 U.S. 520 (1979)), and therefore would not toll the time.

**This is not a constitutional violation because access to the courts, a protected right, is not technically denied.

As noted earlier (see ante at 5), the conditions in most American prisons are so outrageously bad and unsafe as to compel attention to conduct necessary for survival, without time to prepare petitions. Finally, many prisoners spend the first part of their sentences in temporary classification centers. Even after designation, a prisoner may be moved from one institution to another, at the discretion of corrections officials. An inmate may be removed from his designated institution on a writ issued by a prosecutor for a valid reason or merely to harass. Some prisoners have served a major part of their sentences on prison buses in transit between institutions. Some prisoners, for reasons valid or not, may be compelled to spend time in administrative detention or segregation, with limited access to legal materials.

In some instances, petitions are not filed by the district court clerks, but are returned because of procedural or formal defects (Robinson at 13) or are accepted but not filed (Robinson at 45) — situations which could result in failing to meet time deadlines. Suffice it to say that any statute of limitations in these circumstances is intolerable and would constitute a denial of access to the courts.* Particularly

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*A statute of limitations based on a final judgment in the state courts is, as acknowledged (Attorney General's Notes at

(footnote continued)

disturbing is the philosophy implicit in the statute of limitations proposal that a prisoner may be retained in custody if a new decision is rendered holding the statute under which he stands convicted to be substantively unconstitutional, for example, as violative of the First or Fifth Amendments (see Leary v. United States, 395 U.S. 6 (1969); United States v. Liquori, 438 F.2d 633 (2d Cir. 1971)). In situations like these, the prisoner has committed no crime and the state is unjustified in holding him in custody. Further, if in a capital case, the procedure for imposing the death sentence is violative of constitutional provisions, the judgment may not be executed whatever the statute of limitations (Estelle v. Smith, 49 U.S.L.W. 4490 (S.Ct. May 1981)).

In sum, a statute of limitations is unconstitutional as a suspension of the writ and, because of the unique condition of this category of litigant, as a denial of access to the courts. It is also unconstitutional to the extent that it requires custody of a person who has committed no crime. No evidence exists

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(Footnote continued from the preceding page)

2), also unacceptable. Whatever a state's definition of finality, a collateral proceeding is not part of the criminal case and would not prevent finality status from accruing and the statute of limitations from running. Accordingly, if an issue is properly presented in a state post-conviction proceeding, the time period for federal habeas corpus application may run before appropriate state remedies can be exhausted. Second, such a proposal would not consider that a jurisdiction may deem a conviction final prior to the direct appeal and that the time for filing a habeas corpus petition might run before completion of the direct appellate process. Third, such proposals would not deal with those instances in which direct appeals are wrongfully or unconstitutionally denied to a petitioner and then must be reinstated or granted out of time.

to demonstrate that delays in filing habeas corpus petitions are intentional or abusive of the process. In any event, in those cases where abuse or intent is clear, the matter may be resolved on an individual, case-by-case basis. This particular proposal highlights the difficulties of a statute of limitations.

C. No federal examination after a full and fair state proceeding.

Section 5 proposes that no habeas corpus petition be granted with respect to any claim that has been fully and fairly adjudicated in state proceedings. The intent of the proposal is to preclude litigation on habeas corpus of questions of law and mixed questions of law and fact (Atty. Gen. Notes at 32).

The proposal totally changes the law by barring federal review on the ground that the state procedure is fair, rather than denying relief because the state substantive decision was correct. Adoption of this proposal without a simultaneous creation of some other method of federal review leaves the constitutional validity of the proposal in doubt. Furthermore, the suggestion imposes a change of such dimension that Congress should carefully consider whether, as a matter of policy, it should be adopted.

1. The present law

28 U.S.C. §2254 is Congressional direction for federal court consideration of constitutional claims raised by state

prisoners. The mandatory language of subsection (a) demonstrates that the issue must be considered, and that the writ cannot be granted unless, under subsection (b), state remedies are exhausted. Subsection (d) is devoted entirely to the scope of examination of factual issues which is restricted by the nature of the prior proceedings. Generally applicable principles of statutory construction establish that the specific limitation for review of factual issues, with no comparable restriction on questions of law, means that the latter category of issues is to be examined by the federal court without restriction.* The plain meaning of §2254 is that Congress gave federal judges the power to determine questions of law and mixed questions raised in habeas petitions. This power is not, as the Attorney General's notes at 34 would have it, dependent upon Brown v. Allen 344 U.S. 443 (1953). To the contrary, when §2254 was amended in 1966 to add subsection (d) and thereby codify Townsend v. Sain, 372 U.S. 293 (1963), authorization for different treatment of legal and factual questions was granted by Congress. To conclude otherwise would produce the result that state factual determinations are subject to greater examination than questions of constitutional law.

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*We dispute the interpretation of the habeas corpus statute given at 34-35 of the Attorney General's notes, which refer only to 28 U.S.C. §2241.

2. The full and fair hearing

Use of the "full and fair hearing" theory to bar federal consideration of constitutional claims was employed in Stone v. Powell, 428 U.S. 465 (1976), to bar examination of a Fourth Amendment claim. However, two years later the Court made clear that Stone was to be limited to the Fourth Amendment issue. In Rose v. Mitchell, 443 U.S. 545 (1978), the Supreme Court refused to consider that a full and fair hearing in state court would bar consideration of the issue of a racially biased system of selecting a grand jury foreman. The Court referred to the possible inability of a state judge to make reliable legal conclusions with respect to a challenge to the grand jury because the judge was part of the court system which established the grand juror selection process. The present proposal to apply the full and fair hearing limit on federal review of all issues is thus not valid under the law.

Although the proposed legislation is simplicity itself, the Attorney General's notes at 37-41 seek to provide additional qualities to this adjudicative process. These could never be derived from the proposal itself and demonstrate the troublesome nature of the proposal. First, according to the note, the issue must actually be considered and decided on the merits by the state court. Determination of this requirement at a habeas hearing would be time consuming and tedious, if possible at all.

If the issue is raised on the state direct appeal, there is no way to ascertain whether an issue was considered and decided if the court makes its decision without opinion. Summary decisions without opinion are routine and in many states compose the bulk of the cases. Thus, substantial time would be devoted to prying into the practices of the local state courts. On collateral attack, once again the case may be determined not only without opinion, but without full appellate consideration of the merits.

The notes at 38 next state that the decision on the legal issue must be a "reasonable one." The significance of the word "reasonable" as it applies to a legal question is unclear and its application in this context is inappropriate. The suggestion explicitly permits a state court to ignore with impunity the law of its own circuit. On this theory of reasonableness there is no basis for compelling a state court to adhere to the decisions of the Supreme Court. It might similarly be reasonable to ignore all existing precedents and either to revive a disapproved principle or create a new theory. This would constitute and encourage violations of the Supremacy Clause. It would also foster national disparity and lack of uniformity in enforcement of rights guaranteed by the National Constitution. The criterion for federal review of state decisions cannot be the reasonableness of the decision, but whether the decision is correct. A standard of reasonableness is simply unsupportable.

The Attorney General's notes next state that the hearing cannot violate due process, or fail to comply with "a specific federal requirement." Excluded from this requirement is a situation in which the hearing was inadequate for ascertainment of truth. Whatever may constitute such a defect, the hearing cannot be a full one if the truth was not ascertainable by the procedures used.

3. The constitutional defect

Article III of the Constitution describes the judicial power of the federal courts as extending "too all Cases, in Law and Equity, arising under this Constitution...." as well as other cases. Also under Article III, the Congress may make exceptions to Supreme Court appellate jurisdiction, and may grant jurisdiction over the described issues to the district courts and courts of appeal. Under the Supremacy Clause the constitutional law as interpreted by the Supreme Court is binding on the states. Thus, under the Constitution, Congress must vest jurisdiction to hear constitutional issues in some federal court, and can decide how to allocate the burden.

Under 28 U.S.C. §1257, Congress has authorized the Supreme Court to consider in its certiorari jurisdiction constitutional issues coming from the state courts. It is undisputed that the Supreme Court is physically unable to consider every claim presented to it, and its own rules include requirements for certiorari jurisdiction in addition to the presence of a constitutional claim. Thus, while the Supreme Court has power to review constitutional issues presented in cases coming on direct appeal from the state courts, the number of such cases actually reviewed by the Supreme Court is miniscule — perhaps five or six each year.

The habeas corpus procedure is seen as a way to provide for federal review of the constitutional issues coming from state courts because of the necessary limitations on the Supreme Court.

Elimination or severe restriction of habeas corpus procedures would thus leave the Article III power to review constitutional issues unfulfilled. Thus, to adopt the proposal advanced in S. 2216 would be necessary to consider alternative methods of permitting the federal courts to examine the issues properly raised in habeas petitions. Absent creation of alternatives, the habeas corpus procedure cannot be directly precluded or limited in such a way as to be practically abolished.

D. Federal Review of Fact Finding

Section 5 of S. 2216 would presume the correctness of state fact finding after a full and fair hearing. Reference is made in the Attorney General's notes at 43 to the definition of "full and fair" given earlier. The proposal permits the presumption to be rebutted only by clear and convincing evidence produced by the petitioner.

Section 2254(d) sets out the circumstances in which federal courts may re-determine or re-litigate fact findings made by the state courts. The application of §2254(d) is fully described in Sumner v. Mata, 49 U.S.L.W. 4133 (S.Ct. Jan. 21, 1981):

> It is clear that in adopting the 1966 amendments, Congress in §2254(d) intended not only to minimize that inevitable friction but to establish that the findings made by the state court system "shall be presumed to be correct" unless one of the seven conditions specifically set forth in §2254(d) was found to exist in the federal habeas court. If none of these seven conditions were found to exist, or unless the habeas court concludes that the relevant state determination is not "fairly supported by the record," "the burden shall rest upon the appellant to establish by convincing evidence that the factual determination by the state court was erroneous."

Id., 49 U.S.L.W. at 4136.

The Supreme Court made clear in Stone v. Powell, 428 U.S. 465 (1976), that the limitation on the scope of federal review may be imposed, if at all, only after a "full and fair consideration" of the issue by the state courts. In using this reference, the Court cited to Townsend v. Sain, 372 U.S. 293, which provides the basis for the §2254(d) list of procedural requirements.

The requirements of Townsend and subsection (d), having been reaffirmed and having been found appropriate, should not be modified.

Section 2254 permits federal examination of facts if the record as a whole does not fairly support the state fact findings. In such cases, the burden of proving the "correct" facts is shifted to the petitioner. This test is the functional equivalent of the "clearly erroneous" standard, the traditional test for review of judicial fact findings. Fed. R.Civ.P. 52(b); United States v. Gypsum Co., 333 U.S. 364, 394-396 (1948); 5A Moore, FEDERAL PRACTICE, ¶52.03[1] and footnotes. The test is stated thus: when there is evidence to support a finding of fact, but the reviewing court, on the entire record, is nonetheless left with the definite and firm conviction that a mistake has been committed, the court may reject the finding. Under § 2254(d), if review of the state record reveals the findings to be incorrect, the petitioner then has the burden of proof, but he is not faced with the burden of overcoming a presumption of correctness.

E. Appeal

Section 3 of S. 2216 gives courts of appeal exclusive authority to issue the certificates of probably cause which are jurisdictional prerequisites for appeal. The change which would be effected by the proposal is to eliminate the opportunity to seek a certificate from a district judge, and if that is denied, to make a further application to the court of appeals. Section 3 would also require a certificate for appeal by a federal prisoner from an order denying a writ filed pursuant to 28 U.S.C. §2255. No such certificate is needed under current law.

Current district court certification process provides an opportunity for the district court to advise the court of appeals that while it believes the decision denying the writ to be correct, the case presents an important issue for review. The process takes little time, because the judge is aware of the claims involved and can decide whether to grant the certificate with no additional effort. On the other hand, an application for a certificate to the court of appeals generally requires an extended motion and memorandum of law. Usually, because there is no counsel appointed at the district court level, the motion is submitted pro se and a consideration by the court of appeals of the motion requires extended examination of the case. If a certificate is granted, the court reviews the case two times.

No certificate requirement should be imposed upon federal prisoner petitioners. Section 2255 remedies are the equivalent, for the federal petitioner, of a state post-conviction remedy. The federal judge hearing the 2255 motion is the judge before whom the case was tried. The issues may involve the judge's treatment of the case. Accordingly, an appeal as of right from the decision should be permitted.

III. The Recommendations

Our analysis of habeas corpus concludes that the availability of the habeas corpus remedy does not delay punishment (except execution of the death penalty), interfere with rehabilitation, impose disproportionate or unacceptable burdens upon the federal courts, or deprecate decisions of the state courts. In short, the availability of habeas corpus does not affect law enforcement.

Our position also demonstrates that presently applicable statutes and rules provide adequate restrictions upon the individual petitioner who abuses or misuses the writ and that valid state court findings on the issues presented in habeas corpus petitions are fully protected. Recent Supreme Court decisions make clear that the procedural requirements demanded by the statute and judicial precedent will be strictly enforced.

On the other hand, it is clear from the number of petitions dismissed because of failure to state a federal constitutional claim or because of procedural defects such as lack of exhaustion, procedural by-pass, or adequate state court record, that cases come to the federal courts inadequately prepared for presentation. It is also apparent that there are some cases which should come before the federal courts for examination earlier than they actually do and that petitioners should be in a position of having their claims adjudicated as early as possible so that they are not improperly detained.

Finally, it is obvious that numerous petitions may come from the same prisoners, raising one claim repeatedly or different claims successively. These conditions should not exist. Federal courts should be presented with competently prepared documents which fully set out the issues to be raised, including appropriate citation to the record and legal authorities. In addition, compliance with procedural requirements should be alleged and outlined in the petition, or an explanation provided for failure so to comply. The courts should have before them all the relevant documents from the prior proceedings.

Compliance with standards are properly expected by a court asked to decide a case. Compliance also benefits the petitioner, whose rights are better presented and presumably carefully studied by a judge who need not overcome the hurdles of deciphering the petition. Compliance with procedural requirements also benefits the state - both its courts and its prosecutors - which can take steps to cure errors, or at least be on notice as to the nature of the claimed defect in the state procedure.

Yet to meet these important interests, the present system leaves the incarcerated prisoner to prepare his own petition for a writ of habeas corpus, to articulate complex and substantive legal questions, and to face technical and involved procedures without appropriate assistance. The habeas corpus procedure demands the joining of all claims and that they be phrased in constitutional language with citation to appropriate, constitutionally based judicial precedents and references to the state court record.

Although general statistics are not available, research done in one jurisdiction shows that 95% of all prisoner petitions are filed pro se. Requests for assignment of counsel are included in 90% of the cases. Less than 3% of such requests are granted. In the Robinson study it was found that about 18% had counsel. Robinson at 56. There is no study as to why lawyers are not more frequently assigned. It may be due to an absence of a clear standard for assigning counsel. Our recommendation is for early assignment of counsel by the district court unless no federal constitutional issue is raised by the petitioner or unless procedural bars are clear.

Our recommendation is also for assistance to petitioners in the preparation of the petitions and formulation of the issues. As noted, the American Bar Association has recommended such assistance, which will serve both as a screening mechanism against frivolous petitions and as assurance that the petitions will be properly prepared. Robinson at 56.

In addition, court staff counsel can be used to do all the preliminary work of gathering state court records and preparing memoranda for the court.

These steps will streamline the process and speed the resolution of cases.

SUPPLEMENTARY STATEMENT
OF
PHYLIS SKLOOT BAMBERGER
ON BEHALF OF
THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE LEGAL AID SOCIETY OF NEW YORK CITY, AND FEDERAL DEFENDERS
IN RESPONSE TO TESTIMONY GIVEN ON APRIL 1, 1982
TO THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
CONCERNING S.2216

During the course of testimony before the Committee, it was stated by Chief Judge Reynoldson that prisoners use the Civil Rights Act, 42 U.S.C. §1983, to challenge state court convictions in federal courts. We wish to bring to the Committee's attention that it is not permissible to challenge custody due to an alleged defect in a state court conviction by a suit pursuant to §1983. In 1973, the Supreme Court held, in *Preiser* v. *Rodriguez*, 411 U.S. 475:

> Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement and that specific determination must override the general terms of §1983.

And later the Court said:

> What is involved here is the extent to which §1983 is a permissible alternative to the traditional remedy of habeas corpus. Upon that question we hold today that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate or more speedy release from that imprisonment, his sole remedy is a writ of habeas corpus.

The presentation before the Committee was replete with statements by advocates of the proposed amendments that they provide an "escape hatch" where justice requires. While we have articulated our position on the specific parts of the bill, a direct response to the "escape hatch" proposition seems needed. S.2216 provides that there will be no consideration of a constitutional claim if the state processes were "full and fair." The accompanying Attorney General's Notes state that the decision need only be a reasonable one. By design, there is no review permitted of a decision that is constitutionally wrong. Deliberately, the bill makes procedural issues, and not substantive constitutional rights, the focus of the federal courts' examination of habeas corpus. Thus, there is no "escape hatch" for the petitioner who has been incarcerated because the constitutional issue was incorrectly decided by the state courts with adequate procedures. No "escape hatch" exists for the most severe types of injustice. The absence of an "escape hatch" and of the intent to provide one is demonstrated by the absence of a tolling provision in the statute of limitations provision. This is unheard of; even the Federal Speedy Trial Act contains provisions for tolling the running of the time. Thus, the "escape hatch" does not exist. If there is indeed an interest in providing an "escape hatch" for injustice, S.2216 is not an adequate means of accomplishing that goal.

Senator **HEFLIN**. Next is a panel composed of the Honorable C. C. Torbert, Jr., chief justice of the Supreme Court of Alabama; the Honorable W. W. Reynoldson, chief justice of the Supreme Court of Iowa; and the Honorable Jim Smith, attorney general of the State of Florida.

I have a statement we will enter into the record from Charles Graddick, the attorney general of Alabama.

[The following was received for the record:]

STATEMENT OF ALABAMA ATTORNEY GENERAL

CHARLES A. GRADDICK

I appreciate this opportunity to make a statement before you in support of Senate Bill 2166 and Senate Bill 653.

Habeas corpus reform is one of the most important issues facing this Congress. I know that you have heard from several eloquent speakers and have been tendered many statistics which demonstrate the need for fundamental and far-reaching reform of federal habeas corpus. What I would like to do is tell you about a case which I think illustrates the abusive overextension of the federal writ of habeas corpus and demonstrates how very badly corrective legislation is needed. I am familiar with the case because it is one which I personally prosecuted while I was District Attorney, and since I became Attorney General my office has represented the State of Alabama in the appeals which have stemmed from the case.

Early in 1977, a career criminal named John Louis Evans and a co-defendant of his named Ritter went on a cross-country crime spree. The crime spree, which began shortly after Evans and Ritter were paroled from an Indiana prison, lasted more than two months and extended over seven different states. During the crime spree Evans and Ritter by their own admissions committed more than three dozen violent crimes, including robbery, kidnapping, extortion, and murder.

One crime that Evans and Ritter committed was the robbery of a business in Mobile, Alabama on January 5, 1977. When Evans and Ritter entered the business in Mobile, a man named Nassar was working behind the counter. When Evans pulled a pistol on Mr. Nassar, Nassar dropped down on his hands and knees and started crawling away. Evans leaned over the counter and deliberately shot Mr. Nassar in the back killing him. The murder occurred in full view of Mr. Nassar's two young daughters, ages 6 and 9, who were watching television in a corner of the store.

After robbing another establishment in Mobile, Evans and Ritter left the State of Alabama and continued their crime spree in other states.

At one point after he murdered Mr. Nassar, Evans telephoned an F.B.I. agent and suggested that he might turn himself in if the agent could promise Evans that he would get the death penalty. The agent told Evans that he couldn't promise him that he would be executed, so Evans did not turn himself in.

After committing more robberies, and some kidnappings and other violent crimes, Evans and Ritter were finally captured by the F.B.I. in Little Rock, Arkansas in March of 1977. Instead of contesting his guilt, Evans bragged about it from the very beginning. After being warned of his rights, Evans voluntarily confessed to to the F.B.I. agents who captured him the robbery and murder of Mr. Nassar and the three dozen other violent crimes that he and Ritter had committed. Evans waived extradition, and after being returned to Alabama he again voluntarily confessed all of his crimes to officers of the Mobile Police Department and to me in my capacity as District Attorney of Mobile County. In addition to repeatedly confessing his crimes to law enforcement officers, Evans also was interviewed by various members of the news media and confessed and bragged about all of his crimes at every available opportunity.

Despite everything that the attorneys who were appointed to represent him could do, Evans was adamant from the very beginning that he wanted to be convicted and executed for the capital offense of robbing and murdering Mr. Nassar. Evans' actions so frustrated his attorneys that they arranged through the court to have him examined by a psychiatrist. After examining Evans, the psychiatrist reported to the court that Evans was competent and rational; that he knew right from wrong and often chose wrong; that he understood the nature and results of his actions; and that he sincerely preferred execution to a long prison sentence.

Against the advice of his attorneys, Evans voluntarily appeared before the Mobile County Grand Jury and admitted that he had robbed and murdered Mr. Nassar. Evans said that he had been in armed robbery all his life and would go back to it if he could, because it was the easiest way he knew to make money. Evans told the grand jury that he fully understood what he was doing when he shot Nassar, that Nassar was not the first man he had killed, and that he would kill again in the same situation. Evans also told the grand jury that he preferred execution to life in prison.

The Mobile County Grand Jury indicted Evans for the capital offense which he admitted under oath that he had committed. At his arraignment, Evans pleaded guilty. The judge accepted the guilty plea and entered it in the official minutes of the court, but nonetheless scheduled the case for presentation to a jury because that is the special rule in Alabama capital cases.

Evans was tried for the capital offense in Mobile County Circuit Court in April of 1977. At trial the State presented overwhelming evidence of Evans' guilt, including the testimony of eyewitnesses and undisputed scientific proof. After the State rested its case, Evans filed a written motion to plead guilty which was admitted into evidence and went to the jury. Then Evans took the stand and testified against himself. As his own direct examination Evans told the jury:

> MR. EVANS: My name is John Louis Evans, and on January the 5th, I was involved in the crime of Eddie Nassar. I am also the one that did pull the trigger and shoot and kill him during the commission of a felony, a robbery. Our whole trip was based on robbery. Kind of a spree. It was well planned, and I've been in crime a long time. Before you go back in there, the only thing I've got to say to the Jury is that I've been at it a long time, and if you don't come back with a death sentence, which is the only other thing I think you can come out with, I'm going to get out, and I'm going to do it again. There's not any question whatsoever. I have no intention whatsoever of ever reforming in any way, so I think you should do what you have to do, and I would rather die by electrocution than to spend the rest of my life in the penitentiary. So, I'm asking very sincerely that you come back with a positive verdict for the State. That's all I have to say.

Evans also testified under oath that he had shot Nassar in the back, and that he did not feel any remorse about it: "Not at all." Evans acknowledged that his attorneys had advised 20 to 30 times not to pursue the course of action he was pursuing at trial.

After Evans testified, his co-defendant Ritter took the stand. In his testimony, Ritter confessed his part in the crime and implicated Evans. Ritter testified that prior to the time that Evans shot Mr. Nassar, he and Evans had discussed the possibility that they might have to shoot someone during the course of a robbery and they had agreed to do so if necessary.

No evidence was presented at trial to indicate that Evans was anything but guilty of the capital offense.

The jury took less than 15 minutes to convict Evans. After holding a sentence hearing, the judge found that the aggravating circumstances far outweighed the mitigating circumstances and sentenced Evans to death as Evans had requested so many times. Evans' conviction and sentence were affirmed by the Alabama Court of Criminal Appeals in November of 1977 and by the Alabama Supreme Court in May of 1978. The United States Supreme Court denied a writ of certiorari in February of 1979. In April of 1979, Evans filed a petition for a writ of habeas corpus in the United States District Court in Mobile, Alabama. After a full and fair hearing on the merits of the petition, the District Court denied the petition. Evans then appealed the case to the Fifth Circuit Court of Appeals.

In the meantime, the United States Supreme Court had announced its decision in Beck v. Alabama, 447 U.S. 625 (1980), which held that a defendant could not be sentenced to death if the jury which convicted him was not permitted to consider a lesser included offense verdict which was supported by the evidence at trial. In spite of the fact that there was not one jot, speck, or iota of lesser offense evidence in Evans' case, two of the three Fifth Circuit Court of Appeals judges who decided the case held that the Beck decision required that Evans' conviction and sentence be set aside and that he be given a new trial. To the State's argument that Evans had never even alleged or attempted to prove that he was entitled to any lesser offense jury instructions, the Fifth Circuit replied that the State had been unfair to Evans because the statutory provision prohibiting lesser offense instructions might have misled Evans. The two-judge majority held that the federal writ of habeas corpus should issue requiring a whole new trial for Evans in spite of the fact that Evans had admitted, confessed, and pleaded guilty to the capital offense at every stage of the proceeding beginning even before he had heard anything about the Alabama statute. The Fifth Circuit decision was released in October of 1980, and rehearing was denied in March of 1981.

Thereafter, the State of Alabama petitioned the United States Supreme Court to review the Fifth Circuit's decision. The United States Supreme Court granted the State's petition for review in June of 1981, and the case was argued before the United States Supreme Court on March 24, 1982.

I am hopeful that the United States Supreme Court will reverse the egregious decision of the two-judge majority of the Fifth Circuit, but that is not the important point for present purposes. The important point is that here we have a vicious, dangerous criminal who by his own admission has committed more than three dozen violent crimes that we know of. His crimes include the brutal murder in this case of an innocent man in front of his two young daughters, a murder which the defendant not only admitted and confessed but also bragged about at every stage of the proceeding and in the news media. Here we have a case where the law enforcement agencies and the State courts did their jobs and did them well. Within eighteen months of the murder, the murderer had been captured, the case had been investigated and presented to the grand jury, and the murderer had been indicted, arraigned, tried, convicted, and sentenced to death as he himself had requested. The trial and sentence were conducted under procedures which left absolutely no doubt at all about his guilt or about the sentence which he should receive. The conviction and sentence were properly considered and affirmed by both levels of state appellate courts. All of this was accomplished within eighteen months of the time of the crime.

Yet three and a half years after the matter left the State courts and five years after the crime, we are in federal court debating whether all that has gone before should be thrown out and everything started over from square one. And the end is nowhere in sight. We are in federal court simply because two federal appellate court judges in reviewing a federal habeas corpus proceeding speculated that perhaps the State had been unfair to this admitted, confessed murderer. The murderer that those two federal appellate judges said that the State may have been unfair to is the same murderer who first derived great pleasure from committing several dozen violent crimes, including the brutal killing of the innocent victim in this case, and then took such delight in bragging about his crimes at every available opportunity. He is the same murderer who has told everyone who will listen that if he is not executed he will get out of prison and kill again.

There is something very wrong with a criminal justice system that permits this kind of federal court second-guessing of state court judgment. What is wrong is that federal habeas corpus has been abused in the Evans case and in so many others. The founding fathers never dreamed that the writ of habeas corpus would be used to overturn state court convictions and sentences in cases in which there is absolutely no doubt at all about the defendant's guilt. It denigrates the Great Writ to use it to overturn a state court conviction of a murderer who admitted and confessed his guilt and who has testified under oath that he will kill again.

Abusive overextension of the writ of habeas corpus has made a mockery of our criminal justice system's avowed goal of ensuring swift and certain punishment for those whose guilt is established beyond doubt. This Committee can and should do something about the grave problem. It ought to give a favorable report to S. 653 or S. 2166, or similar legislation designed to reform federal habeas corpus law. Any such reform legislation can and should contain a provision limiting federal habeas corpus relief to those cases in which there is at least a colorable assertion of innocence, or an averment that there has been a miscarriage of justice. Otherwise, the type of egregious abuse of federal habeas corpus which occurred in the Evans case will happen again in future cases.

Senator **Heflin**. Also, Senator Grassley was here and wanted to say that he is very sorry that he could not be here to introduce you, Chief Justice Reynoldson, but he had to be somewhere else at the time.

But rather than going into a long introduction of each of you, if you will, we will go ahead. Chief Justice Torbert, we would be delighted to hear from you.

STATEMENT OF A PANEL CONSISTING OF HON. C. C. TORBERT, JR., CHIEF JUSTICE, SUPREME COURT OF ALABAMA; HON. W. WARD REYNOLDSON, CHIEF JUSTICE, SUPREME COURT OF IOWA; AND THE HON. JIM SMITH, ATTORNEY GENERAL, STATE OF FLORIDA

Justice **Torbert**. Well, thank you very much, Senator Heflin. I am pleased to be here. Having appeared at the previous hearing on November 13 with respect to Senate bill 653, many of the general comments that I made and placed in the record both by written statement and also verbally need not be restated except to say that from the standpoint of the Conference of State Chief Justices of this Nation, at least since 1960 at its annual conference in Baltimore and as recently as August of 1981, the conference has been concerned with the review of State court convictions by our brothers and sisters of the Federal bench.

For several years we have had a committee concerning itself with that problem. In 1980, the conference passed a resolution, the effect of which recognized that under our dual system, we accept without question that it is appropriate that there be review of Federal constitutional issues by Federal courts by habeas corpus petitions.

At the same time, the 1981 resolution stated that we recognize some misuse and abuse of the great writ. We were concerned about the delays and uncertainties both to the prejudice of the defendant as well as to the public. I might footnote there that from the standpoint of a judicial officer, it seems to me that it is just as prejudicial to a defendant to have to wait many, many years to present a constitutional claim as it is to the public that has to wait for some final resolution years and even decades later.

So, that recommendation concluded by petitioning the Congress and the Federal courts to require an orderly and timely presentation of these claims, and to restore finality to the criminal processes, but not deprive any citizen of this country from asserting constitutional rights.

In 1981, the conference endorsed in principle the concept of Senate bill 653, and now today you consider the administration's proposal, S. 2216. Without going into any detail, it seems to me, Mr. Chairman, that the thrust of the problem is a matter of confidence in the judicial processes of the States and the Nation.

You, formerly as chief justice, and your speaker have been concerned with that kind of confidence that we strive for in the processes. I believe that one of the central, underlying issues in Federal courts dealing with the review of State court convictions is a subconscious, perhaps, questioning of the processes of our State courts.

I might add here that the States of this Nation, working with the National Center for State Courts and supporting your legislation for the establishment of a State justice institute, address these problems in the education of judges and more the establishment of efficient judicial processes. And it seems to me that we have come a long way.

The question, of course, remaining is, have we come far enough so that the Federal courts will accept our resolution of some of these very delicate issues involving the use of the writ of habeas corpus?

One thing comes to mind, and that is in the factfinding process. There are troublesome issues, as I view the matter, in the factfinding process where you have, in a live case, a disputed issue of fact with respect to a constitutional claim, where there is a swearing match—one on behalf of the prosecution through the law enforcement officer; on the other side, the defendant and his witnesses—as to whether a confession was coerced. Now, in many cases that factfinding process was resolved by State courts—at the trial level, at the intermediate appellate level, and at the Supreme Court level. And yet it becomes troublesome as we view the confidence in the system that the Federal magistrate or the article 3 Federal judge reviews, on a cold record, those same sets of facts and comes to a different conclusion. It is criticized as being second-guessing.

But the fact remains that there are cases on the books today where our brothers and sisters on the Federal bench come to a different conclusion. It seems to me that that is an issue that needs to be addressed by this Congress and by our Federal courts.

I must comment about Mr. Gillers' offer of some compromise that I think is worthy of some response. Yes, there has been in every State in this Nation the problem of adequate legal assistance to the indigent, and each State in its own way addresses that problem.

I could not help but think about his charge to this Congress about addressing that problem, and I have always wondered as to a matter of priority at the national scene of devoting resources of $200 million to $300 million in the legal services area for the poor and disadvantaged in civil matters. And at the same time, Congress has not seen fit to allocate similar resources for the protection of the life and liberties of our indigent criminal defendants. I think the point that he makes is well taken as an overall view of the solutions to these issues.

I was also interested in the statute of limitations issue. I am not completely satisfied—and I detect some question from you—as to the application of the statute of limitations with respect to Senate bill 2216.

For example, if it runs from the exhaustion of the State remedy and if the State has an open-ended remedy—for instance, a writ of error coram nobis, newly discovered evidence—how can you ever measure that if the State law is open-ended? If the State procedure is open-ended, then to me the 1-year statute does not have much force and effect.

I have some disagreement, perhaps, with the panel and perhaps with Mr. Gillers with respect to the full and fair hearing provision in Senate bill 2216. I view that as rather important, and more than that, it seems to be a simple concept embodied in the administration's proposal.

It reads very short and very simply:

> An application for the writ of habeas corpus in behalf of a person in custody, pursuant to a judgment of a state court, shall not be granted with respect to any claim that has been fully and fairly adjudicated in state proceedings.

I agree with the last witness who testified that, yes, of course, it is always a matter of whether the court decided correctly, a matter of law. But it also involves the opportunity of a defendant to present a claim, who fails or refuses to do so. I concede that it will be subject to judicial interpretation.

I suppose that I should comment that those of us on the State bench are not alone in expressing some concern about this problem. Various members of the U.S. Supreme Court, as late as March 3, 1982, in the *Lundy* case referred to, have recognized and have indicated a sincere interest in finality and federalism.

There are two points I would like to make. One is a point from the *Henderson* case and, I think, *Kibby* case in 1977, that not every constitutional claim should be cognizable under Federal habeas corpus, and that the burden of showing actual prejudice really is greater or should be greater in a habeas collateral attack than it should be on direct appeal.

Justice Stevens, in the *Lundy* case in a concurring opinion, said that habeas corpus relief should not be extended in any constitutional error, even harmful enough to reverse on direct appeal, unless the error made the trial fundamentally unfair. And, of course, Mr. Chief Justice Burger, in his yearend statement that has been referred to, talks about limiting Federal collateral review in habeas corpus cases to claims of manifest injustice.

But the problem that this committee and this Congress addresses, in which there is intense interest from attorneys general, from Governors, and from those of us who are in the State judicial system are the two bills that you have pending before you, and although we could talk all day about their differences and the nuances—the problem is there.

Some relief is needed for our citizens, and I think that the time is at least right to address the problem and to afford some relief. Thinking of you and where we come from, it reminds me of the story about young men who were coon hunting in the South and having a rather good time. And there was a gentleman named John Eubanks, who was a great American, who was always fair and a great conservationist, and who did not believe in shooting a coon. But he always would climb the tree or he would cut the tree down so that the dogs then could chase the coon.

The story is well known that on one evening, a coon was treed by his best dog in the tallest sweet gum tree in the swamp that had no limbs closer than 20 feet from the ground. John Eubanks licked his chops and decided to climb the tree because it was too big to chop down.

He climbed up to the top of the tree and as they awaited him to take a stick out of his overalls to punch the coon and make the coon fall to the ground, there was a great hue and cry from John Eubanks in the top of that tree, and John Eubanks said, "Do something; he is killing me."

Well, it turned out that it was not a coon, it was a lynx; that is a souped-up bobcat. So, as John Eubanks and that lynx were fighting it out at the top of the tree, he kept exclaiming, "He is killing me; do something." And the boys below said, "Put him out of the tree, John; put him out of the tree." And, again, there was hollering and shouting.

Finally, a companion who carried a pistol to shoot snakes heard John Eubanks exclaim, "Kill this thing." And the man looked at him and said, "John, I cannot shoot up in the top of that tree; I may hit you." John Eubanks responded by saying, "Shoot up here amongst us; one of us has got to have some relief."

Well, the point of the story only is that we are addressing a serious problem, but the citizens of this country are entitled to have some relief as we address the issue of the use of Federal habeas corpus. Thank you, Mr. Chairman.

Senator **Heflin**. Thank you.

Chief Justice Reynoldson, we would be delighted to hear from you.

Justice **Reynoldson**. Mr. Chairman, it is an honor to have this opportunity to participate in this hearing relating to S. 2216, and I might say that we have missed you on the conference of chief justices and follow your career in the Congress with great interest.

Parenthetically, before visiting about some of the matters that I addressed in the written statement which I have submitted, I would like to remark on the excellent papers and presentations of Professor Gillers and Ms. Bamberger, but noting a few things that have been overlooked or which have escaped their attention.

The point has been made here by both of them that, after all, there are only about 8,000 habeas cases filed in 1981 in the Federal courts, and that should not be an insurmountable burden. As a matter of fact, as I think the professor's paper reflects, the filings have gone down slightly in the last 11 years.

This overlooks, however, that the State prisoners have found a new vehicle for raising many of these same issues in Federal court, and that is, of course, the section 1983 civil rights cases that are being filed against State officials.

As a matter of interest and for the record, in 1871 when that legislation was enacted, until 1920, there were only 21 such cases filed in Federal court. In 1966, there were 216; in 1980, there were 12,580 such cases. In 1981, over 40 percent of the private Federal question cases—that is, not against the United States and its officers—were civil rights suits against State and local officers. Of these, 15,639 were brought by State prisoners—a 155-percent increase from 1975.

Now, that has undoubtedly impacted—and I understand from my Federal judge friends that it has—the Federal judiciary. So, you have to look at that and then add these 8,000 habeas cases to realize the full impact that is being occasioned to the Federal justice system.

Parenthetically, also, it is interesting to note that Ms. Bamberger says on page 12 of her paper, "Only a few writs are granted each year." And I think Professor Gillers, if I understood him, said that the number of writs granted really was miniscule.

I think that says something about the type of review the State appellate courts are giving Federal constitutional questions, and I think it says something also with respect to that underlying thing that I am going to address in just a few minutes that underlies all of this concern that these cases be heard in the Federal courts; that is, that the State court judges are somehow inadequate to take care of these questions.

Going back for a moment to the claim that these habeas cases do not impact the Federal district courts, we note that in the papers filed here in opposition to S. 653 last fall, the contention was being made that the Federal magistrates must conduct the hearings in order to save the time of the Federal district judges.

Finally, I must rise at least to the defense of Iowa lawyers against the professor's allegations that the State prisoners were many times represented by ineffective counsel. That has not been our experience, and from my observations in Iowa, it is not true at least in that State. We find that these prisoners are very well represented.

Professor Gillers makes the point that this is one of the most frequent grounds for habeas writs in Federal court. One of the reasons, of course, is that challenges can be made on the basis of ineffective counsel that do not appear in the record in the trial court.

In our State courts, of course, we have the postconviction relief statute. We provide counsel. We have this scrutiny after the conviction, and we have these swearing matches, of course, between the prisoner and his counsel in the trial of the case as to what was said in the attorney-client relationship. And we find more and more that Iowa lawyers who do not appreciate the allegations that they are ineffective bring the client back into chambers and make a record with the court reporter as to what the attorney is advising the client in these situations.

Perhaps that is unavoidable, but I think it is unfortunate that lawyers have to try these cases with one eye on their client's case and the other one on their own reputation as to what may happen down the road.

In that connection, I want to make a reference to a case that is not in my statement, and that is *Sims* v. *Iowa,* 295 Northwestern 2d 420. In that case, Mr. Sims, who admitted on the witness stand that he and his wife were quarreling and that she retreated to a bedroom and he shot a pistol through the door and killed her—when it finally appeared in our court for the third time, we had affirmed the direct appeal. It had been up there on a postconviction relief proceeding. It was returned up there the second time on a postconviction relief proceeding. It had been through two Federal courts—a district court and a Federal appellate court.

In this particular case, when it came there for the third time, Mr. Sims was asserting that his trial counsel was incompetent. The different lawyer who tried his first postconviction relief proceeding in the Iowa district court was incompetent, and the lawyer who took the appeal from that case was incompetent; all three lawyers were alleged to be incompetent.

So, these matters are getting ventilated in the State appellate courts.

Now, I want to not speak so much in generalities because we have had a lot of generalities so far in this hearing. I want to explore the anatomy of a 1977 murder case in Iowa, *State* v. *Moore.*

Senator HEFLIN. Let me ask you this. Would it be inconvenient if we adjourned and came back at 1:15? Mr. Smith, would it be inconvenient for you?

Mr. SMITH. Mr. Chairman, I have a plane at 1:55. I have a meeting in Tampa.

Senator HEFLIN. Our Alabama delegation meeting started at 12. Well, you have got a plane. All right, we will go ahead and see if we cannot finish, then.

Mr. SMITH. I can be brief.

Senator HEFLIN. All right.

Justice REYNOLDSON. I wanted to mention this case, Mr. Chairman, because it does get into this amendment that discusses a fair hearing in the trial and appellate courts.

This particular defendant caused a commotion in the courtroom, badgered a witness, used vulgar language, and persisted in profane and disrespectful statements to the court. After calling another recess and warning him, the trial court ultimately had defendant Moore removed from the courtroom during 25 minutes of an expert's testimony.

In a 1979 decision, the Iowa Supreme Court ruled he had waived his sixth amendment right to confront the adverse witness and we upheld his conviction. Our opinion quoted the relevant portion of the transcript and applied as controlling the Supreme Court standards laid down in *Illinois* v. *Allen,* a U.S. Supreme Court decision.

In 1980, a Federal trial court, ruling on a writ of habeas corpus, set out the same portion of the transcript, found *Illinois* v. *Allen* to be controlling, and issued the writ. Following an appeal to the Eighth Circuit, they again quoted the familiar portion of the transcript and, for a third time, applied *Illinois* v. *Allen* and agreed with the Iowa Supreme Court and reversed the Federal district court.

Now, this procedure injected 2 years of uncertainty in the *Moore* case. It cost Iowa substantial prosecutorial resources to defend the judgment it had secured in one State court and retained in another. And, of course, it risked tension between the State and Federal courts in Iowa.

This, I think, would have been eliminated, had we had this proposed new subsection (d) to section 2254 of title 28, and that, of course, has been referred to here:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in state proceedings.

I think that this *Moore* case would be the type of a case in which the Federal district judge, having that statute before him, could have promptly applied it and taken care of the writ of habeas corpus under that proceeding.

I appreciate, and the Chair has pointed out, that there are probably going to be some interpretive problems with what "fully and fairly" means, but I think at the very minimum, it ought to mean that the Federal district courts should pay great deference to State appellate court decisions where the problem has been fully explored.

I wanted to touch briefly, and I have in my paper, on the constitutionality of this 1-year limitation. It appears to us that there should not be any substantial problem to that. The only constitutional reference to habeas corpus is in the suspension clause, which says:

> The privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it.

There is nothing in that language, nor in the history of that constitutional provision, that would lend support to any theory that it would invalidate a limitation statute. A suspension is defined by Black's Law Dictionary, "to interrupt, to cause or cease for a time, but with an expectation or purpose of resumption." Thus, a suspension would prevent the right from being invoked 'but with an expectation of resumption.

A limitation period, however, permits the right for a limited time, at the end of which the right expires with no possibility of revival. Three State courts—and we have cited them—interpreting similar provisions in their own constitutions, have held that the suspension of the writ which is prohibited means the denial to the citizen of the right to demand an investigation into the cause of his detention.

From an historical standpoint—and I am sure that the Chair is familiar with it—the framers of our Constitution did not intend the habeas corpus writ to be a postconviction relief mechanism at all. Of course, it would follow, then, that the suspension clause is inapplicable to section 2254, whether or not it is amended by S. 2216.

Professors Hart and Wechsler, in their book that I cite in the prepared paper, say:

> The proceedings of the Convention do not cast much direct light on just what the framers assumed the privileges of the writ to be. But it was, of course, the clear, contemporaneous understanding that the fundamental function of the writ was to test executive detentions and that convictions by a criminal court of competent jurisdiction could not be reexamined on habeas corpus at all.

It is a matter of comment everywhere that until 1869, there was no Federal habeas jurisdiction to inquire into detentions pursuant to State law. Clearly, then, it cannot be contended that the suspension clause was ever intended to protect the use of the writ of habeas corpus as a device to investigate State court convictions. It follows that constitutional provisions cannot be invoked to nullify a reasonable time limitation on the right to make application for the writ.

In view of the Chair's limitations of time, I am not going to go into several other matters that I had hoped to visit about. I have pointed out a study we made of Iowa appellate court decisions and how many Federal cases we find ourselves citing.

I pointed out that in 72 of the Iowa decisions in criminal cases in 1981, we cited 327 Federal decisions, and in 8 postconviction opinions, we cited 53 Federal cases. And there is no substance, I think, to the implied claim, at least, that the State courts are not aware of Federal constitutional provisions or Federal law, or that the State courts are unable to meet the challenge of applying Federal constitutional provisions.

Thinking back again on what Ms. Bamberger and Professor Gillers said, it seems to me that they jump to a conclusion from the outset that article III of the Constitution requires that Federal district judges must provide the necessary oversight to State appellate decisions.

Of course, I do not read anything in there that says that, and I think that what Professor Bator in his Harvard Law Review article said is significant. He said:

> Of course, Federal law is higher than State law, but that does not automatically tell us that it is better for Federal judges to pronounce it than State judges, much less that once a State judge has done so on a fair and rational investigation, this should be disregarded and done over again by a Federal judge.

As the Chair well knows, under the supremacy clause, the State judges take the oath when they put on the robe to follow the Federal Constitution and the Federal laws, and that is what we propose to do.

I think this proposed amendment to S. 2216, while it does not do all that we would like for it to do and does not have some of the provisions that we liked about S. 653, is a forward step in bringing a degree of order to our disarrayed and redundant national criminal justice system. And I think I speak for most State judges when I wish the Congress success in implementing this amendment.

Senator HEFLIN. Thank you.

[The prepared statement follows:]

STATEMENT
OF
W. WARD REYNOLDSON
CHIEF JUSTICE, SUPREME COURT OF IOWA

Mr. Chairman and Members of the Committee on the Judiciary:

It is a rare honor to have an opportunity to participate in this important hearing relating to S. 2216.

Iowa is a typical state in the heartland of America, its economic foundation braced in both agriculture and manufacturing. Its population is more urban than rural and is ethnically, economically, and racially diverse--in our peculiarly American fashion. Therefore, in many ways, the interface of its federal and state litigation is a microcosm of national judicial strengths and frailties.

From the insight and perspective I have acquired as Iowa's chief justice, I have grave concerns relating to the present functioning of federal habeas corpus litigation. There is an unrelenting oversight of state judicial operations, and a continued duplication of judicial efforts in an era of crushing federal case loads and limited federal funding.

On the state level, our prosecutorial resources are being squandered, our judges frustrated, and our citizens disillusioned by the lack of finality in criminal convictions. The redundancy of collateral federal habeas corpus attacks on state judgments[1] and the spectre of state supreme court decisions, carefully researched and reasoned to provide defendants the full panoply of federal constitutional rights, being set aside by the ruling of a single federal district judge,[2] are shackling our criminal law. Chief Justice Burger addressed these problems in his 1981 Year-End Report on the Judiciary when he wrote:

> I hope Congress will promptly consider limiting federal collateral review of state court convictions to claims of manifest miscarriages of justice. The administration of justice in this country is plagued and bogged down with lack of reasonable finality of judgments in criminal cases.

Explore with me for a moment the anatomy of a 1977 Iowa murder trial, State v. Moore. Moore, who had assaulted and injured a jailer at a recess, in the course of trial badgered a witness, used vulgar language, and persisted in profane and disrespectful statements to the court. After calling another recess and subsequently warning him, trial court ultimately had Moore removed from the courtroom during twenty-five minutes of an expert's testimony. In a 1979 decision, the Iowa Supreme Court ruled Moore had waived his sixth amendment right to confront the adverse witness and upheld his conviction.[3] Our opinion quoted the relevant portion of the transcript and applied as controlling the Supreme Court's standards laid down in Illinois v. Allen.[4] In 1980 a federal trial judge, ruling on Moore's application for writ of habeas corpus, set out the same portion of the transcript, found Illinois v. Allen to be controlling, but issued the writ.[5] In 1981, following the State's appeal, the Eighth Circuit, again quoting the then-familiar portion of the transcript and for the third time applying Illinois v. Allen standards, agreed with the Iowa Supreme Court and reversed the federal district court.[6]

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[1] The scope of these collateral attacks is summarized in L. Yackle, Postconviction Remedies 366-70 (1981).

[2] More disturbing is the major role of federal magistrates and law clerks in these decisions. In 1981 there were 7,790 state prisoner habeas dispositions. Administrative Office of the United States Courts, 1981 Annual Report of the Director 63 (pre. ed. 1981). Of these, magistrates disposed of 5,270. Id. at A-152. The necessary expanding reliance on federal law clerks, most of whom never have held a responsible position in the trial of a case, has become a subject of concern. See Cannon & Cikins, Interbranch Cooperation in Improving the Administration of Justice: A Major Innovation, 38 Wash. & Lee L. Rev. 1, 16 (1981); McCree, Bureaucratic Justice: An Early Warning, 129 U. Pa. L. Rev. 777, 785-87 (1981); Rubin, Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency, 55 Notre Dame Law. 648, 652-53 (1980).

Thus Moore was permitted to collaterally attack his conviction in two federal courts even though the identical issue was fairly and fully considered and decided in his state court direct appeal. This process injected over two years of uncertainty into his case after his state appeal was concluded, cost Iowa substantial resources to defend the judgment it had secured in one state court and retained in another, and risked tensions between the state and federal courts in Iowa.

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[3] State v. Moore, 276 N.W.2d 437 (Iowa 1979).

[4] 397 U.S. 337 (1970).

[5] Moore v. Scurr, 494 F. Supp. 1042 (S.D. Iowa 1980), rev'd, 647 F.2d 854 (8th Cir.), cert. denied, 102 S. Ct. 670 (1981).

[6] Scurr v. Moore, 647 F.2d 854 (8th Cir.), cert. denied, 102 S. Ct. 670 (1981).

No one suggests federal oversight of state decisions involving federal constitutional rights should be eliminated. Adoption of S. 2216, however, would avoid many unfortunate and wasteful proceedings. For example, proposed new subsection (d) to section 2254 of title 28 provides:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in state proceedings.[7]

Such a provision, promptly applied by the federal district judge in the Iowa case just discussed, would have terminated the *Moore* litigation in the federal courts.

Another welcome and remedial provision in S. 2216 is new subsection (e) proposed to be incorporated in section 2244 of title 28, providing for a one-year limitation for habeas application.[8] This should obviate those long-delayed applications brought after the witnesses have forgotten the facts, or died. It would avoid the necessity to expose the victims--especially rape victims--to a traumatic confrontation with the accused, dredging up memories suppressed with great difficulty.

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[7] This provision would restore the review standard to that existing in the case law prior to 1953 when Justice Frankfurter in Brown v. Allen, 344 U.S. 443, 508-10, launched the concept that the "full implication of the requirement of Congress" mandated "that the District Judge decide constitutional questions presented by a State prisoner even after his claims have been carefully considered by the State courts." *Id.* at 508. Of course, nothing in the federal statutes at that time intimated that federal courts should give no deference to state court determinations of federal constitutional issues. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 501 (1963).

> Of course federal law is higher than state law. But that does not *automatically* tell us that it is better for federal judges to pronounce it than state judges, much less that once a state judge has done so on a fair and rational investigation, this should be disregarded and done over again by a federal judge.

Id. at 505.

Those who oppose this legislation as unconstitutional must base their analysis on the only constitutional reference to habeas corpus, the suspension clause, United States Constitution article I, section 9, clause 2:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

There is nothing, however, in either the language or the history of this constitutional provision that lends support to a theory that it would invalidate a limitation statute.

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[8] The limitation period shall run from the latest of the following times: (1) the time at which state remedies are exhausted; (2) the time at which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such state action; (3) the time at which the federal right asserted was initially recognized; or (4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.

First of all, the clause refers to a "suspension" not a limitation. Black's Law Dictionary 1615 (rev. 4th ed. 1968) defines "suspend" as:

> To interrupt; to cause to cease for a time; to postpone; to stay, delay, or hinder; to discontinue temporarily, but with an expectation or purpose of resumption.

Thus a suspension would prevent the right from being invoked, but "with an expectation . . . of resumption." A limitation period, however, permits the right for a limited time at the end of which the right expires with no possibility of revival. Three state courts, interpreting similar provisions in their own constitutions, have held that "[t]he 'suspension' of the writ which is prohibited means the denial to the citizen of the right to demand an investigation into the cause of his detention." State v. Towery, 143 Ala. 48, 50, 39 So. 309, 309-10 (1905); see Wiglesworth v. Wyrick, 531 S.W.2d 713, 716-17 (Mo. 1976); Hoffman v. Edwards, 48 N.C. App. 559, 564, 269 S.E.2d 311, 314 (1980). It is plain that S. 2216 does not deny a citizen the right "to demand an investigation into the cause of his detention." Rather, it permits the right for a reasonable period of time.

Second, from an historical perspective, the framers of our constitution did not intend the habeas corpus writ to be a post-conviction relief mechanism at all. It follows, of course, that the suspension clause is inapplicable to section 2254, whether or not amended by S. 2216.

> The proceedings of the Convention do not cast much direct light on just what the Framers assumed the "privileges" of the writ to be; but it was of course the clear contemporaneous understanding that the fundamental function of the writ was to test executive detentions and that convictions by a criminal court of competent jurisdiction could not be reexamined on habeas corpus at all.

Hart and Wechsler's The Federal Courts and the Federal System 1513 (2d ed. 1973). See Swain v. Pressley, 430 U.S. 372, 384-86 (1977) (Burger, C.J., concurring); Ex parte Dorr, 44 U.S. (3 How.) 103, 104-05 (1845); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 170 (1970); Oaks, Legal History in the High Court--Habeas Corpus, 64 Mich. L. Rev. 451, 468 (1966). As a matter of fact, until 1867 there was no federal habeas corpus jurisdiction to inquire into detentions pursuant to state law.[9] Clearly, then, it cannot be contended that the suspension clause was ever intended to protect the use of the writ of habeas corpus as a device to investigate state court convictions. It follows that constitutional provision cannot be invoked to nullify a reasonable time limitation on the right to make application for the writ.

An underlying but seldom discussed reason these unlimited collateral attacks are permitted is the encrusted concept that state court judges are inferior in some way, that they are insensitive to federal constitutional rights and ignorant of federal law. There is no evidence to support those conclusions and it is past time for these misconceptions to be rejected.

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[9] Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 465 (1963); see Ex parte Dorr, 44 U.S. (3 How.) 103, 104-05 (1845).

There is hard evidence that shows how intertwined state and federal law has become. Among the 281 published opinions of the Iowa Supreme Court in 1981, almost 150 opinions were criminal appeals. Seventy-two of these cases cited a total of 327 federal decisions.[10] Additionally, fifty-three federal cases were cited in eight post-conviction opinions. Fifty-seven civil cases cited a total of 188 federal cases. Twenty of our opinions cited the United States Code; twenty-seven cited the federal rules of criminal or civil procedure or the federal rules of evidence. I am convinced, but cannot prove, that Iowa appellate justices spend almost as much time in the federal reporters as in state reporters. Degrading the sense of responsibility, experience and training of modern-day state judges ignores the enormous strides made in state court judicial systems, including but not limited to merit selection and tenure, The National College for the Judiciary in Nevada, The Institute for Court Management in Colorado, and The National Center for State Courts in Williamsburg. The Supreme Court, most recently in Allen v.

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[10] In contrast, the Iowa Supreme Court cited only 12 federal decisions in the 52 criminal cases it decided in 1927. It was not until Powell v. Alabama, 287 U.S. 45 (1932), that the United States Supreme Court began to apply the requirements of the federal Bill of Rights to the states.

McCurry[11] in 1980 and Sumner v. Mata[12] in 1981, has expressed its confidence in the ability of state courts to uphold federal law.

I suggest the same trust should be evidenced by enacting federal legislation like S. 2216, designed to eliminate wasteful duplication of federal and state court efforts and to mesh their respective jurisdictional gears, each rotating on its own axis in the highest tradition of federalism, to generate efficient justice for the greatest number of Americans.

Twenty-five years ago the Conference of Chief Justices, meeting in New York, endorsed proposed legislation similar to that before you.[13] At its 1981 annual meeting the Conference took similar action with respect to the 1981 bills, S. 653 and H.R. 3416, incorporating the same concepts.

This legislation you now consider, S. 2216, does not do all some of us had hoped for. It does not curtail the power of federal magistrates to review state supreme court decisions, a feature of several prior proposed amendments, including H.R. 3416 and 4419. Nor does it incorporate the concept frequently suggested, that the prisoner, following exhaustion of appellate review, confine all subsequent judicial review to claims of miscarriage of justice.[14] Neither does it permit collateral attack "[with a few important exceptions] only when the prisoner supplements his constitutional plea with a colorable claim of innocence."[15]

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[11] 449 U.S. 90, 105 (1980).

[12] 449 U.S. 539, 549 (1981) ("State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted that all are not doing their mortal best to discharge their oath of office.").

[13] S. 1011, introduced February 1, 1957, and companion bill H.R. 8361.

But it is a forward step in bringing a degree of order to our disarrayed and redundant national criminal justice system. Speaking for many state court judges, I commend you for your efforts and wish you all success in implementing S. 2216.

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[14] Burger, *Annual Report to the American Bar Association*, 67 A.B.A. J. 290, 293 (1981).

[15] Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142. *See also* Schaefer, *Is the Adversary System Working in Optimal Fashion?* in *The Pound Conference: Perspectives on Justice in the Future* 171, 182 (A. Levin & R. Wheeler ed. 1979).

Senator HEFLIN. Mr. Smith.

Mr. SMITH. Mr. Chairman, I know you are in a hurry and I will be very, very brief. I would like to make three points.

On the question of a determination of a full and fair hearing, the Department of Justice, in their analysis of this problem and their comments on S. 2216, provide a definition of what a full and fair hearing means, and I would suggest strongly that that definition be placed in the law. It would solve a lot of problems for us down the road with that interpretation.

Additionally, on the question of the statute of limitations, I feel very strongly that that statute should begin to run from the State court final decision, either by the State supreme court or a State district court, if that were the final decision of the criminal laws of that State, rather than the 1-year statute that is provided in S. 2216. I think that the 1-year statute, as it is provided in S. 2216 now, really would not amount to a statute of limitations at all. Inmates would wait to begin their collateral review when they wanted to.

I will not go into the details of it now because I know of your time constraints, but my comments are very specific on why we would strongly recommend a 3-year statute, commencing with the State court final determination of the sentence.

Finally, I think it is interesting to note a recent enactment by the Congress which severely limits to a much greater extent habeas review of inmates within the District of Columbia, which I think was passed 4 or 5 years ago by the Congress and has been upheld in 1977 by the U.S. Supreme Court. So, there is precedent for the Congress to set policy in this area, and certainly that policy for inmates who reside within the District of Columbia is much more severe than the policy position that we are asking the Congress to take in this instance.

With that, I will conclude and if you have any questions, I would be happy to answer them.

[The prepared statement follows:]

TESTIMONY BY
FLORIDA ATTORNEY GENERAL JIM SMITH

Mr. Chairman.

Members of the Judiciary Committee.

I am Jim Smith, Attorney General of Florida . . . one of two states out of which the book on abuses of the writ of habeas corpus is being written. Texas is the other.

Florida and Texas produced 35 percent of all petitions for the writ filed in the United States in 1980 . . . and 46 percent of all the evidentiary hearings held in such actions.

Speaking for Florida, I can say that those petitions . . . arising from the expansion of constitutional rights from the bench . . . have created unwarranted chaos in the administration of justice.

A flood has been unleashed that must be curtailed if we expect to restore finality and public confidence to our criminal justice system.

State prisoners filed more than 78 hundred petitions in 1981. I think the number that resulted in any relief to the petitioner . . . 3.2 percent . . . aptly describes their legal merit.

The numbers also illustrate the conversion of the writ from a shield against prosecutorial abuses into a sword for fending off the lawful judgments of state courts.

Members of this Congress representing Florida have introduced legislation similar to that which is before you today in an effort to return the writ to its rightful purpose.

I think I can say for them . . . and for the people of Florida . . . that this legislation is long overdue and we are grateful for the opportunity to be heard in its behalf.

I want to make it clear that Florida is not here to argue for fewer safeguards against wrongful convictions . . . or to suggest that the skids of due process need to be greased.

The committee will no doubt hear the bill described in these terms by others.

We believe in due process and the right of any defendant to press a meritorious claim. However, our people also have due process rights.

And chief among these is the right to have their laws enforced and the judgments of their courts upheld.

We accept the procedural changes of the past 30 years that have ensured fair trials; we do not accept the expansion of these new rights beyond due process and fairness to frustrate justice.

Abuses of the writ have become so commonplace today as to be virtually codified as devices with which to challenge alleged errors of search, arrest, confession or trial . . . often decades later . . . which issues could and should have been raised at the trial or on direct appeal.

It is virtually impossible for states to defend such claims so long after the original trial, and yet they certainly do not qualify as claims that could become evident only with the passage of time.

I suggest they become evident when appeals on the merits have run their course and the defendant is grasping for any means of forestalling the sentence of the court.

It is clear from the timing of many of these petitions . . . such as after the death of a key witness . . . that the intent is not to right a wrong but to create an opportunity.

An opportunity to roll the dice against the system.

So we have Holzapfel v. Wainwright alleging 21 years post-conviction that a confession was coerced. The two witnesses who could rebut the claim were by then dead.

And we have Jackson v. Estelle, alleging error by trial counsel 30 years after conviction.

Judge Griffin Bell is right when he says no criminal defendant has any reason to accept his guilt as long as he can endlessly appeal.

Justice Burger is right when he questions whether a society is redeemed if it provides every conceivable safeguard for accused persons, but cannot protect its citizens.

All of us agree that swift and sure punishment is the deterrent of the criminal laws; yet we are looking at a system today that can't deliver on its penalties.

The legislation before you will neither weaken the writ, repeal any rights or bar the introduction of legitimate claims.

It is not a shortcut through due process, but a measured pace that includes all the steps . . . without duplicating any of them.

It reaches for a balance of the rights of defendants and the state in arriving at a just determination of the charges.

I strongly favor the bill.

However, I have a number of recommendations, based on the experience we have had on the state level, that I believe will improve it without extensive change.

My major concern is with the language imposing the one-year limitation period for review of state convictions. This of course directly affects the interests of the states in reaching finality of judgments. This provision is found in Section 2(e).

Specifically, we would propose that this period commence on the date of the final state judgment and sentence rather than from the time "at which state remedies are exhausted."

I suggest that the language of this subsection (e)(1) would be subject to a range of judicial interpretations, one of which is that there is no statute of limitations at all.

The Justice Department, on page 24 of its analysis, proposes that this problem be cured by the individual states' enacting limitations on state collateral proceedings.

Justice also said laches would be available to the states in situations where the petitioner waited an unduly long period of time to bring his federal proceedings.

I don't consider this an appropriate remedy for our very serious problem with habeas abuse.

It is not inconceivable that you would have numerous states enacting different limitation periods, which would create chaos in the enforcement of a federal statute that is supposed to be uniform in its application.

Some states might even seek to abolish collateral actions in state courts in order to obtain the finality so urgently needed.

The premise of the bill is that a state prisoner should raise all of his claims during his trial and on direct appeal, and that failure to do so bars such claims under Section 2(d), absent a showing of cause as defined in Section 2(d).

Obviously, if the federal claims are properly raised at trial and on appeal a collateral action in state court is unnecessary and inappropriate.

In Florida, issues which could have and should have been raised at trial and on direct appeal cannot be raised in a collateral proceeding.

This usually means that collateral actions are limited to claims of ineffective assistance of counsel, newly discovered evidence that could not have been ascertained throught due diligence, and newly announced decisions of constitutional magnitude that could not be reasonably anticipated (in contrast to mere refinements of existing legal concepts). Witt v. State, 387 So.2d 922 (Fla. 1980).

There really is no race to exhaust state remedies.

We suggest, therefore, that three years is an appropriate limitation on a collateral action questioning competence of counsel and other collateral claims.

Under Section 2(e) as written, even though the factual basis of claims could have been discovered through due diligence, the petitioner does not have to commence his federal action within one year, since he can wait many years and file a collateral state action, even if it is obviously doomed to failure.

This is what is currently happening in our capital cases.

Although the petitioners could file collateral claims almost immediately after the Supreme Court of the United States denies certiorari, they wait until a death warrant is issued before attempting to exhaust their state remedies.

These last-minute attempts to relitigate claims which have already been decided by state courts, or claims which could and should have been raised in state court, or claims which have been waived, are almost always ultimately unsuccessful, yet they serve to delay finality and frustrate justice for years. The Constitution does not require such delay and reasonable men should not sanction or create such opportunities. Once a state prisoner is provided a fair trial and fair review, finality must follow.

Indeed, the Justice Department in Section 6, dealing with the period of limitation for federal prisoners filing under Section 2255, creates a two-year period which commences when the judgment of conviction becomes final. This is the proper time to begin tolling the period. If it is good enough for federal prisoners, it is good enough for state prisoners.

I am aware of the concern that a state prisoner could . . . in some unique situation . . . be precluded from filing a timely petition in the federal court while legitimately trying to exhaust state remedies. Although I am convinced this is more theoretical than real, the committee could add a proviso saying that if the district court finds the petitioner failed to file within three years because he was diligently pursuing available state remedies, and the state court failed expeditiously to dispose of his cause, the petition may be entertained.

An alternative approach would be to provide that exhaustion of state remedies would be unnecessary if doing so provably would expire the period for filing a federal petition for writ of habeas corpus.

As expressed on page 22 of its analysis of S. 2216, the Department's concern that the three year statute of limitation period suggested in S. 653 may collide with challenges by habeas corpus to conditions and duration of confinement as a result of administrative action is misplaced. Such challenges would be accepted under Section 2(e)(4) which provides that the period of limitation begins to run when the factual predicate of the claim could have been discovered. Thus there will be no tension with challenges to confinement as a result of administrative action and my proposed three year period of limitation effective when the state court judgment becomes final.

Mr. Chairman, I think it is advisable, in Section 2(d)(1), referring to state action barring the raising of claims, to insert judicial or prosecutorial between the words "state" and "action" on line 5.

The effect of this would be to preclude the phrase "state action" from developing into something not desired by the Congress. I suggest it could as written be argued to mean a host of actions, greatly expanding the opportunities for harassing litigation. This change should be made throughout the bill in references to state action.

In Section 2(d)(2), we would recommend adding and has been determined to be retroactive after the semicolon and before the word "or." This change should also be made throughout the bill in the identical circumstance.

This change would make the legislative intent clear, not relying on an implication that might open the door to semantical exercises whose outcome in court would be unpredictable.

We quite strongly agree with the language in Section 5(d) regarding denial of habeas relief on claims that have been fully and fairly adjudicated by state courts.

We've seen countless abuses by federal courts second-guessing our state courts on the law and the facts, frequently ordering new evidentiary hearings that are wasteful of the time and resources of both.

To cement the intent of this provision as explained by the Justice Department's analysis of S. 2216 at pages 36-41, I strongly urge the adding of a subsection defining "full and fair." This can be done by incorporating the Justice analysis at page 41 into S. 2216 by adding the following to Section 5(d):

> Fully and fairly adjudicated shall mean: (1) the claim at issue was considered and decided on the merits in state proceedings; (2) the factual determination of the state court, the disposition resulting from its application of the law to the facts, and its view of the applicable rule of federal law were reasonable; (3) the adjudication was consistent with the procedural requirements of federal law; (4) there is no new evidence of substantial importance which could not reasonable have been produced at the time of the state adjudication; and (5) there is no subsequent change of law of substantial importance which has been determined to be retroactive.

This is particularly true since the intent is to modify the existing judicial definition of full and fair hearing without a statutory definition. Obviously, the courts would defer to existing case law and the intent of the bill as expressed by the Department would not be achieved.

We believe the intent of the Congress, as explained in the Justice Department's analysis at pages 29-33, would also be more evidently ascertained by the addition of the words frivolous on its face to Section 5(b) following the word "application" on line 13 in the paragraph authorizing the federal courts to deny on the merits.

There should be no apprehension that these proposals . . . which do no more than curtail some of the excesses spawned by unbridled writ-writing . . . deprive anyone of due process.

Indeed, in the case of Swain v. Pressley, 430 U.S. 372 (1977), the United States Supreme Court reversed the Court of Appeals of the District of Columbia for having concluded that §23-110(g), D.C. Code Ann., unconstitutionally suspended the writ in the District of Columbia. This provision prevented district courts from hearing petitions for the writ of habeas corpus for prisoners convicted and sentenced under the laws of the District of Columbia.

If legislation (congressional) such as §23-110(g) of the D.C. Code can leave those persons convicted of felonies in the district without an avenue to federal habeas corpus, then surely these prudent modifications should lay to rest any concerns about their constitutional validity.

Mr. Chairman, the recommendations I have made here are in no way intended to fault the drafters of this legislation.

I assure you Florida would be pleased to have it in its present form for the substantial relief it would provide in stemming the abuses that have made the writ something it was never meant to be.

Our suggestions are based on extensive experience with the ingenuity and arrogance of petitioners . . . and some surprising twists of logic by the judiciary in continuing to broaden the scope of the writ.

My hope is to be of assistance to the committee in producing legislation that will withstand all efforts to distort it.

Justice Burger himself on numerous occasions has expressed the hope that Congress will limit federal colalteral review of state court convictions to "manifest miscarriages of justice."

He very correctly observed that the judicial process becomes a mockery if forever open to retrials and appeals.

Just last month, Justice Stevens also urged that the writ of habeas corpus be confined to cases of fundamental unfairness, commenting that federal judges have at times lost sight of the "true office" of the writ and construed it as authority to consider it a direct appeal from a trial court. Like us, he complains of the flood of litigation of habeas claims and urged the writ be returned to its original purpose: questions of fundamental unfairness only. See Rose v. Lundy, 50 U.S.L.W. 4272, March 3, 1982, U. S. Sup. Ct.

There may have been a time when states were foot-dragging on questions of constitution rights. But our state courts have reached a stage of maturity and awareness on such issues.

The abuses of the past can never be repeated. Neither the federal nor the state courts would permit it, and there is no doubt that state courts are today fully capable of properly disposing of federal constitutional questions.

Mr. Chairman, I want to commend you and the Administration for the legislation, which recognizes the competence of state courts and fulfills a pledge by the Administration to adhere to the principles of federalism.

Senator **HEFLIN**. Well, thank you very much. We may submit some written questions to the panel. I hate that I have to run, but we do have problems about time here.

Thank you very much.

[Whereupon, at 12:20 p.m., the committee was adjourned.]

APPENDIX

Is Innocence Irrelevant? Collateral Attack on Criminal Judgments

Henry J. Friendly†

Legal history has many instances where a remedy initially serving a felt need has expanded bit by bit, without much thought being given to any single step, until it has assumed an aspect so different from its origin as to demand reappraisal—agonizing or not. That, in my view, is what has happened with respect to collateral attack on criminal convictions. After trial, conviction, sentence, appeal, affirmance, and denial of certiorari by the Supreme Court, in proceedings where the defendant had the assistance of counsel at every step, the criminal process, in Winston Churchill's phrase, has not reached the end, or even the beginning of the end, but only the end of the beginning. Any murmur of dissatisfaction with this situation provokes immediate incantation of the Great Writ, with the inevitable initial capitals, often accompanied by a suggestion that the objector is the sort of person who would cheerfully desecrate the Ark of the Covenant. My thesis is that, with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence.

If there be fear that merely listening to such a proposal may contaminate, let me attempt to establish respectability by quoting two statements of Mr. Justice Black:

> . . . the defendant's guilt or innocence is at least one of the vital considerations in determining whether collateral relief should be available to a convicted defendant.[1]

And more strongly:

> In collateral attacks . . . I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt.[2]

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† Judge, United States Court of Appeals for the Second Circuit. This article was presented as the 1970 Ernst Freund lecture at the University of Chicago Law School. It constituted a revision of the Gifford lecture given in April, 1970, at the Syracuse University Law School.

[1] Kaufman v. United States, 394 U.S. 217, 235-36 (1969) (dissenting opinion).

[2] *Id.* at 242.

Incredibly, these statements were made in dissent. Even more incredibly, the two other dissenting Justices expressed qualms about them.[3] I believe, with qualifications I will elaborate, that this position ought to be the law and that legislation can and should make it so. When I speak of legislation, I am thinking mainly of federal habeas corpus for state prisoners and its equivalent for federal prisoners, since no other course seems realistic in light of Supreme Court opinions. In many states it may still be possible to reach the proper result by judicial decision. Although, if past experience is any guide, I am sure I will be accused of proposing to abolish habeas corpus, my aim is rather to restore the Great Writ to its deservedly high estate and rescue it from the disrepute invited by current excesses.

Seventeen years ago, in his concurring opinion in *Brown v. Allen*,[4] Mr. Justice Jackson expressed deep concern over the "floods of stale, frivolous and repetitious petitions [for federal habeas corpus by state prisoners which] inundate the docket of the lower courts and swell our own." The inundation consisted of 541 such petitions. In 1969, state prisoners filed 7,359 petitions for habeas corpus in the federal district courts, a 100 per cent increase over 1964.[5] Federal prisoners filed 2,817 petitions challenging convictions or sentences, a 50 per cent increase over 1964.[6] Prisoner petitions, including those attacking the conduct of prison officials, totalled 12,924. These "comprise the largest single element in the civil caseload of the district courts" and "accounted for more than one-sixth of the civil filings."[7] There has been a corresponding increase in the load imposed by post-conviction petitions upon the federal courts of appeals. Despite the safeguard intended to be afforded by the requirement of a certificate of probable cause,[8] there were over twice as many *appeals* by state prisoners in 1969 as there were *petitions* in 1952.[9] A similar explosion of collateral attack has occurred in the courts of many of the states. If 541 annual petitions for federal habeas corpus by state prisoners were an "inundation," what is the right word for 7,500?[10]

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[3] *Id.* at 242 (dissenting opinion of Harlan, J., speaking also for Stewart, J.).

The conflict between Justice Black and his brethren on this score surfaced again in Wade v. Wilson, 396 U.S. 282 (1970). The majority was there concerned with "a question of first impression," namely, whether the Constitution requires a state to provide an indigent prisoner with a transcript of his eight-year-old trial so that he may "comb the record in the hope of discovering some flaw," 390 F.2d 632, 634 (9th Cir. 1968), although he had previously had access to a transcript and his request for a new one made no claim that any error actually existed. Reversing a decision of the court of appeals directing denial of the petition, the majority instructed the district court to hold the case in the hope that somehow a transcript might become available and the supposedly serious constitutional issue might thus be avoided. Justice Black thought the writ should be dismissed as improvidently granted, stating:

> This case is but another of the multitudinous instances in which courts are asked interminably to hash and rehash points that have already been determined after full deliberation and review. One considered appeal is enough, in the absence of factors which show a possibility that a substantial injustice has been inflicted on the defendant.

396 U.S. at 289.

[4] 344 U.S. 443, 532, 536 & n.8 (1953).

[5] 1969 ANN. REP. OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 144 [hereinafter cited as 1969 ANNUAL REPORT]. The most recent figures available, those for the third quarter of fiscal 1970, show a 19% increase over the same quarter of 1969. 1969 ANNUAL REPORT Fig. D.

[6] *Id.* The increase is to be contrasted with the declining number of federal convictions and the rather static number of incarcerations in substantially the same period. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFENDERS IN THE UNITED

STATES DISTRICT COURTS 5-8, 30-37 (1970). There was a further increase of 20% in the third quarter of 1970 over the corresponding quarter of 1969. 1969 ANNUAL REPORT Fig. D.

[7] 1969 ANNUAL REPORT 141.

[8] 28 U.S.C. § 2253 (1964).

[9] In 1969, collateral attacks by state prisoners accounted for 1197 appeals and by federal prisoners for 591. These comprised more than 20% of all appeals from district courts. *See* 1969 ANNUAL REPORT 196-97. It is not generally realized to what extent the courts of appeals are becoming criminal courts. The combination of the two categories cited and direct criminal appeals amounted to 50% of all appeals from the district courts.

For most circuits the state prisoner figures do not include unsuccessful applications by state prisoners for the issuance of certificates of probable cause. On the other hand, they do include cases where the district court has issued a certificate and, under Nowakowski v. Maroney, 386 U.S. 542 (1967), the court of appeals has been obliged to hear the appeal although it believed the certificate was improvidently issued. *See* Garrison v. Patterson, 391 U.S. 464, 465-67 (1968). In view of the staggering growth in the case loads of the courts of appeals and prospective further increases as the ratio of criminal appeals to convictions after trial approaches 100% (*see* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 578 (1969)), Congress should move promptly to amend 28 U.S.C. § 2253 (1964) so as to place the authority to issue certificates of probable cause solely in the courts of appeals and require similar authorization for appeals by federal prisoners in cases under 28 U.S.C. § 2255 (1964) and FED. R. CRIM. P. 35. This is the opposite of the solution proposed in an elaborate 240-page Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1195 (1970) [hereinafter cited as *Developments Note*]. While the authors profess concern over "the time spent on deciding whether to issue a certificate," any judge could have told them how small this is as compared to the time spent in hearing an appeal and the burden on assigned counsel of having to argue a hopeless case. The Note suggests that "appeals courts can institute summary procedures if the burden of petitions is too great." Why not the existing "summary procedure" for screening out hopeless cases by requiring applications for a certificate, which are carefully processed for the judges by well-trained clerks assigned for the purpose?

[10] The *Developments Note, supra* note 9, at 1041 seeks to minimize the burden on the basis that in 1968 "[m]ost of the petitions were quickly dismissed" since less than 500 "reached the hearing stage"—meaning a trial of the petition. The conclusion does not follow at all: a petition may require large expenditure of time by district and circuit judges even though no evidentiary hearing is held. Furthermore, the ability of the *federal* courts to dispense with evidentiary hearings in a large proportion of the state prisoner petitions is due in considerable measure to *state* post-conviction trials, and my concern is with the *total* burden.

The proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such efforts at undoing judgments of conviction. He would be surprised, I should suppose, to be told both that it never was really bad and that it has been steadily improving, particularly because of the Supreme Court's decision that an accused, whatever his financial means, is entitled to the assistance of counsel at every critical stage.[11] His astonishment would grow when we told him that the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime.[12] His surprise would mount when he learned that collateral attack on a criminal conviction by a court of general jurisdiction is almost unknown in the country that gave us the writ of habeas corpus and has been long admired for its fair treatment of accused persons.[13] With all this, and with the American Bar Association having proposed standards relating to post-conviction remedies[14] which, despite some kind words about finality, in effect largely repudiate it, the time is ripe for reflection on the right road for the future.

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[11] Gideon v. Wainwright, 372 U.S. 335 (1962) (trials); Doughty v. Maxwell, 376 U.S. 202 (1964) (guilty pleas); Douglas v. California, 372 U.S. 353 (1963) (appeals).

[12] Chief Justice Burger has recently spoken to this point:

> In some of these multiple trial and appeal cases the accused continued his warfare with society for eight, nine, ten years and more. In one case more than sixty jurors and alternates were involved in five trials, a dozen trial judges heard an array of motions and presided over these trials; more than thirty different lawyers participated either as court-appointed counsel or prosecutors and in all more than fifty appellate judges reviewed the case on appeals.
>
> I tried to calculate the costs of all this for one criminal act and the ultimate conviction. The best estimates could not be very accurate, but they added up to *a quarter of a million dollars*. The tragic aspect was the waste and futility, since every lawyer, every judge and every juror was fully convinced of defendant's guilt from the beginning to the end.

Address before the Association of the Bar of the City of New York, N.Y.L.J., Feb. 19, 1970, at 1; 25 Record of N.Y.C.B.A. 14, 15-16 (Supp. 1970). Along the same lines Justice Schaefer of Illinois remarked at a conference of the Center for the Study of Democratic Institutions in June, 1968:

> What bothers me is that almost never do we have a genuine issue of guilt or innocence today. The system has so changed that what we are doing in the courtroom is trying the conduct of the police and that of the prosecutor all along the line. Has there been a misstep at this point? At that point? You know very well that the man is guilty; there is no doubt about the proof. But you must ask, for example: Was there something technically wrong with the arrest? You're always trying something irrelevant. The case is determined on something that really hasn't anything to do with guilt or innocence. To the extent you are doing that to preserve other significant values, I think it is unobjectionable and must be accepted. But with a great many derailing factors there is either no moral justification or only a very minimal justification.

[13] Three cases a century apart, *Ex parte* Lees, 120 Eng. Rep. 718 (Q.B. 1860); *Re* Featherstone, [1953] 37 Crim. App. 146; and *Re* Corke, [1954] 1 W.L.R. 899, sufficiently illustrate the unawareness by the English courts of the extensive "common-law powers of the habeas judge," discovered in the extensive obiter in Fay v. Noia, 372 U.S. 391, 416 n.27 (1963). *See* Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 452-56, 461-68 (1966). The safeguard lies in exercise of the royal prerogative by the Home Secretary, who can at any time refer a petition to the Court of Appeal if he wishes judicial aid. *See* Criminal Appeal Act 1968, c. 19, § 17.

I wish to emphasize at the outset that my chief concern is about the basic principle of collateral attack, rather than with the special problem of federal relief for state prisoners which has absorbed so much attention since *Brown v. Allen.* I must therefore make my main analysis in the context of a unitary system. My model will be designed for our only pure example of a unitary structure, the federal system when dealing with federal convictions. Later I shall advocate adoption of the same model by the states for their much larger number of prisoners and of corresponding changes with respect to federal habeas for state prisoners. I shall conclude by showing that these proposals are wholly consistent with the Constitution.

I

For many reasons, collateral attack on criminal convictions carries a serious burden of justification.

First, as Professor Bator has written, "it is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating that law will swiftly and certainly become subject to punishment, just punishment."[15] It is not an answer that a convicted defendant generally remains in prison while collateral attack is pending. Unbounded willingness to entertain attacks on convictions must interfere with at least one aim of punishment—"a realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation." This process can hardly begin "if society continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place."[16] Neither is it an adequate answer that repentance and rehabilitation may be thought unlikely in many of today's prisons. That is a separate and serious problem, demanding our best thought[17] but irrelevant to the issue here.

A second set of difficulties arises from the fact that under our present system collateral attack may be long delayed—in *habeas corpus* as long as the custody endures,[18] in federal *coram nobis* forever.[19] The longer the delay, the less the reliability of the determination of any factual issue giving rise to the attack.[20] It is chimerical to suppose that police officers can remember what warnings they gave a particular suspect ten years ago, although the prisoner will claim to remember very well. Moreover, although successful attack usually entitles the prisoner only to a retrial, a long delay makes this a matter of theory only.[21] Inability to try the prisoner is even more likely in the case of collateral attack on convictions after guilty pleas, since there will be no transcript of testimony of witnesses who are no longer available.[22] Although the longer the attack has been postponed, the larger the proportion of the sentence that will have been served, we must assume that the entire sentence was warranted.[23] The argument against this, that only a handful of prisoners gain release, whether absolute or conditional, by post-conviction remedies, is essentially self-defeating,[24] even if it is factually correct. To such extent as accurate figures might indicate the problem of release to have been exaggerated, they would also show what a gigantic waste of effort collateral attack has come to be. A remedy that produces no result in the overwhelming majority of cases, apparently well over ninety per cent, an unjust one to the state in much of the exceedingly small minority, and a truly good one only rarely,[25] would seem to need reconsideration with a view to caring for the unusual case of the innocent man without being burdened by so much dross in the process.

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[14] ABA Standards Relating to Post-Conviction Remedies [hereinafter cited as ABA Report]. The Tentative Draft, issued in January, 1967, was approved by the House of Delegates in February, 1968.

[15] Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452 (1963) [hereinafter cited as Bator], an article from which I have drawn heavily. *See also* Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 387 (1964) [hereinafter cited as Amsterdam]; President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts 45-47 (1967).

[16] Bator, *supra* note 15, at 452.

[17] See the address of Chief Justice Burger referred to in note 12 *supra*.

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[18] This is an understatement. The Supreme Court has held that if habeas corpus is begun during custody, subsequent release does not moot the case. Carafas v. LaVallee, 391 U.S. 234 (1968). *See also* Jones v. Cunningham, 371 U.S. 236 (1963), allowing a petition to be brought by a prisoner released on parole, and United States *ex rel.* Di Rienzo v. New Jersey, 423 F.2d 224 (3d Cir. 1970), allowing habeas corpus when the sentence had been completed but it was possible that time could be credited on a second sentence being served.

[19] United States v. Morgan, 346 U.S. 502 (1954).

[20] Note Mr. Justice Douglas' recent statement in Illinois v. Allen, 397 U.S. 337, 351 (1970) (concurring opinion), that while "elapse of time is not necessarily a barrier to a challenge of the constitutionality of a criminal conviction . . . in this case it should be."

[21] *See* Peyton v. Rowe, 391 U.S. 59, 62-63 (1968), and Judge Wyzanski's comment in Geagan v. Gavin, 181 F. Supp. 466, 469 (D. Mass. 1960), *aff'd*, 292 F.2d 244 (1st Cir. 1961), *cert. denied*, 370 U.S. 903 (1962).

[22] Although the decision in McMann v. Richardson, 397 U.S. 759 (1970), wards off the worst threats with respect to collateral attack on convictions after guilty pleas, others remain. The Court expressly did not decide whether federal habeas will lie where state statutes, such as N.Y. CODE CRIM. PROC. §§ 813a and 813g, allow appeals from convictions on pleas of guilty following adverse decisions on motions to suppress evidence alleged to have been illegally seized or a confession claimed to have been unlawfully obtained, as held in United States *ex rel.* Rogers v. Warden, 381 F.2d 209 (2d Cir. 1967), and United States *ex rel.* Molloy v. Follette, 391 F.2d 231 (2d Cir.), *cert. denied*, 391 U.S. 917 (1968). At the very least there should be a requirement that federal habeas be instituted promptly after conclusion of the state appeal.

[23] When the sentence has been fully served, it is almost certain that the state will not bother with a retrial. *See* United States v. Keogh, 391 F.2d 138, 148 (2d Cir. 1968). Successful collateral attack, very likely on a ground having no bearing on guilt, thus will mean wiping out the conviction of a guilty man. *See, e.g.*, United States *ex rel.* [illegible] v. LaVallee, 2d Cir. 1970, in which a prisoner who had admitted guilt sought habeas corpus after completing his sentence because his lawyer allegedly had misinformed him of how long this might be. Such cases pointedly raise the question whether the only goal served by post-sentence collateral attack, namely, eradicating civil disabilities and social stigma, warrants the effort expended on the many attacks that fail and the likelihood of an essential unjust result in the few that succeed. *See* Hewett v. North Carolina, 415 F.2d 1316, 1325-26 (4th Cir. 1969) (Haynsworth, C.J., concurring). Certainly these would

Indeed, the most serious single evil with today's proliferation of collateral attack is its drain upon the resources of the community—judges, prosecutors, and attorneys appointed to aid the accused, and even of that oft overlooked necessity, courtrooms. Today of all times we should be conscious of the falsity of the bland assumption that these are in endless supply.[26] Everyone concerned with the criminal process, whether his interest is with the prosecution, with the defense, or with neither, agrees that our greatest single problem is the long delay in bringing accused persons to trial.[27] The time of judges, pros-

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be prime cases for requiring a colorable showing of innocence save in most exceptional instances.

[24] *Developments Note*, *supra* note 9, at 1041. The basis for this assertion is that the federal courts released only 125 state prisoners in fiscal 1964 as against 3220 petitions filed, and that 350 *reported* district court decisions in 1968 showed outright releases of only 14 and remands of 25 to state courts for retrial or release. These figures do not take account of prisoners released by the states or under 28 U.S.C. § 2255 (1964). Wright and Sofaer regard the federal figures as showing a number of releases of state prisoners, about 4% of the cases, that is "surprisingly high." They cite a few examples where federal habeas unquestionably served a good purpose. Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 899 & nn.15 & 16 (1966).

[25] Accepting the figure of 4% absolute or conditional release in federal habeas for state prisoners, we lack information as to what happened on a retrial. On the assumption that half were again convicted, this leaves only 2% of the petitioners who benefited. Here again we do not know how many of these cases represented prisoners "whom society has grievously wronged and for whom belated liberation is little enough compensation," Fay v. Noia, 372 U.S. 391, 440-41 (1963), or how many were black with guilt. The assumption that many of them fall in the former category is wholly unsupported.

[26] The Supreme Court in another context has recently adverted to "scarce judicial and prosecutorial resources" and has emphasized the desirability of conserving these "for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof." Brady v. United States, 397 U.S. 742, 752 (1970).

[27] *See* REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 255-56 (1966); REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 154 (1967). Excluding cases involving defendants who are fugitives or in the armed forces, 16.9% of all criminal cases in the United States district courts

ecutors, and lawyers now devoted to collateral attacks, most of them frivolous, would be much better spent in trying cases. To say we must provide fully for both has a virtuous sound but ignores the finite amount of funds available in the face of competing demands.

A fourth consideration is Justice Jackson's never refuted observation that "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones."[28] The thought may be distasteful but no judge can honestly deny it is real.

Finally, there is the point which, as Professor Bator says, is "difficult to formulate because so easily twisted into an expression of mere complacency."[29] This is the human desire that things must sometime come to an end. Mr. Justice Harlan has put it as well as anyone:

> Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.[30]

Beyond this, it is difficult to urge public respect for the judgments of criminal courts in one breath and to countenance free reopening of them in the next. I say "free" because, as I will later show, the limitation of collateral attack to "constitutional" grounds has become almost meaningless.

These five objections are not at all answered by the Supreme Court's conclusory pronouncement: "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."[31] Why do they have *no* place? One will readily agree that "where life or liberty is at stake," different rules should govern the determination of guilt than when only property is at issue: The prosecution must establish guilt beyond a reasonable doubt, the jury must be unanimous, the defendant need not testify, and so on. The defendant must also have a full and fair opportunity

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have been pending for more than a year—in many districts the figure is much higher. 1969 ANNUAL REPORT, *supra* note 5, at 270-72. At the end of 1968, New York City had a non-traffic criminal backlog of more than 520,000 cases, 177,000 of which involved defendants who could no longer be located. NEW YORK CITY CRIMINAL JUSTICE INFORMATION BUREAU, THE NEW YORK CITY CRIMINAL COURT: CASE FLOW AND CONGESTION FROM 1959 TO 1968, 12-13. It seems likely that the *average* delay between indictment and trial is at least a year.

[28] Brown v. Allen, 344 U.S. 443, 537 (1953).

[29] Bator, *supra* note 15, at 452.

[30] Sanders v. United States, 373 U.S. 1, 24-25 (1963) (dissenting opinion).

[31] *Id.* at 8.

to show an infringement of constitutional rights by the prosecution even though his guilt is clear. I would agree that even when he has had all this at trial and on appeal, "[t]he policy against incarcerating or executing an innocent man . . . should far outweigh the desired termination of litigation."[32] But this shows only that "conventional notions of finality" should not have *as much* place in criminal as in civil litigation, not that they should have *none*. A statement like that just quoted, entirely sound with respect to a man who is or may be innocent, is readily metamorphosed into broader ones, such as the Supreme Court's pronouncement mentioned above,[33] expansive enough to cover a man steeped in guilt who attacks his conviction years later because of some technical error by the police that was or could have been considered at his trial.

Admittedly, reforms such as I am about to propose might not immediately meet some of these points. Aside from the most drastic measures,[34] changes that would narrow the grounds available for collateral attack would not necessarily discourage prisoners from trying; they have everything to gain and nothing to lose. Indeed, collateral attack may have become so much a way of prison life as to have created its own self-generating force: it may now be considered merely something done as a matter of course during long incarceration. Today's growing number of prisoner petitions despite the minute percentage granted points that way. But I would hope that over a period of time the trend could be reversed, although the immediate response might be less than dramatic. Furthermore, a requirement that, with certain exceptions, an applicant for habeas corpus must make a colorable showing of innocence would enable courts of first instance to screen out rather rapidly a great multitude of applications not deserving their attention and devote their time to those few where injustice may have been done, and would effect an even greater reduction in the burden on appellate courts. In any event, if we are dissatisfied with the present efflorescence of collateral attack on criminal convictions and yet are as unwilling as I am to outlaw it and rely, as in England, solely on executive clemency,[35] it is important to consider reform. If mine is not the best mousetrap, perhaps it may lead others to develop a better one.

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[32] Note, *Federal Habeas Corpus Review of State Convictions: An Interplay of Appellate Ambiguity and District Court Discretion*, 68 YALE L.J. 98, 101 n.13 (1958).

[33] Another example is Professor Pollak's statement that "where personal liberty is involved, a democratic society employs a different arithmetic and insists that it is less important to reach an unshakable decision than to do justice." Pollak, *Proposals to Curtail Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 65 (1956). Valid though this is when there is some question of an innocent man languishing in prison, why does "justice" require repeated opportunities to litigate issues of police or prosecutorial misconduct having no bearing on guilt? Does not Chief Justice Ellsworth's statement, "But, surely, it cannot be deemed a denial of justice, that a man shall not be permitted to try his case two or three times over," Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 320, 328 (1796), have *some* application in criminal cases?

[34] For example, a statute of limitations on the availability of collateral attack.

II

Broadly speaking, the original sphere for collateral attack on a conviction was where the tribunal lacked jurisdiction either in the usual sense[36] or because the statute under which the defendant had been prosecuted was unconstitutional[37] or because the sentence was one the court could not lawfully impose.[38] Thirty years ago, in approving the use of habeas corpus to invalidate a federal conviction where the defendant had lacked the assistance of counsel, Mr. Justice Black was careful to kiss the jurisdictional book.[39] He said that although the court may indeed have had "jurisdiction" at the beginning of the trial, this could be lost "due to failure to complete the court" as the sixth amendment was thought to require.[40]

Many of the most famous and salutary uses of habeas can be fitted under this rubric. *Moore v. Dempsey*[41] was clearly such a case, and insofar as *Brown v. Allen* and its companion case, *Speller v. Allen*,[42] dealt with racial discrimination in the selection of the jury, they also could be considered as such. Claims that a jury was subjected to improper influences by a court officer[43] or had been overcome by excessive publicity[44] are also of this sort. In such cases the criminal process itself has broken down; the defendant has not had the kind of trial the Constitution guarantees. To be sure, there remains a question why, if the issue could have been raised on appeal and either was not or was decided adversely, the defendant should have a further opportunity to air it.[45] Still, in these cases where the attack concerns the very basis of the criminal process, few would object to allowing collateral attack regardless of the defendant's probable guilt. These cases would include all those in which the defendant claims he was without counsel to whom he was constitutionally entitled. This need not rest on Justice Black's "jurisdictional" approach. For, as Justice Schaefer of Illinois has so wisely said, "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."[46]

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[35] However, it is amazing how far current discussions ignore this possibility of relief. One wonders whether some lawyers assigned to represent habeas petitioners may not be more interested in establishing a point than in getting their clients out of jail. See, in this connection, the comment in Fortas, *Thurman Arnold and the Theatre of the Law*, 79 YALE L.J. 988, 995 (1970). On the other side, I am always surprised at the willingness of prosecutors to let hard cases get to the Supreme Court rather than prevent the making of bad law by recommending clemency at an early stage. *See* Fay v. Noia, 372 U.S. 391, 476 n.28 (1963) (Harlan, J., dissenting).

[36] *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830).

[37] *Ex parte* Siebold, 100 U.S. 371 (1879). *See* Amsterdam, *supra* note 15, at 384 & n.30. This, of course, is quite consistent with a view that the prime objective of collateral attack should be to protect the innocent.

[38] *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

[39] Johnson v. Zerbst, 304 U.S. 458 (1938).

[40] *Id.* at 468.

[41] 261 U.S. 86 (1923).

[42] 344 U.S. 443 (1953).

[43] Parker v. Gladden, 385 U.S. 363 (1966).

[44] Sheppard v. Maxwell, 384 U.S. 333 (1966).

Another area in which collateral attack is readily justified irrespective of any question of innocence is where a denial of constitutional rights is claimed on the basis of facts which "are *dehors* the record and their effect on the judgment was not open to consideration and review on appeal."[47] The original judgment is claimed to have been perverted, and collateral attack is the only avenue for the defendant to vindicate his rights. Examples are convictions on pleas of guilty obtained by improper means,[48] or on evidence known to the prosecution to be perjured,[49] or where it later appears that the defendant was incompetent to stand trial.[50]

A third justifiable area for collateral attack irrespective of innocence is where the state has failed to provide proper procedure for making a defense at trial and on appeal. The paradigm is *Jackson v.*

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[45] *See* Bator, *supra* note 15, at 457.

[46] Schaefer, *Federalism and State Criminal Trials*, 70 HARV. L. REV. 1, 8 (1956).

I would not be inclined to apply the same rule of automatic entitlement to collateral attack to *all* cases where the claim is lack of effective assistance of counsel—a claim that is bound to be raised ever more frequently as claims of total lack of counsel diminish in the course of time. I would assimilate cases where the state is alleged to have *prevented* counsel from doing his job—for example, by forcing him to trial without adequate opportunity for preparation, as in Powell v. Alabama, 287 U.S. 45 (1932)—to those where counsel was not provided at all. It is tempting to extend this principle to other cases where the ineffectiveness of counsel is flagrant and apparent. But the difficulty of drawing a line between such cases and the more frequent claims of ineffectiveness by hindsight would lead me to place all these in the category where a colorable showing of innocence should be required.

[47] Waley v. Johnston, 316 U.S. 101, 104-05 (1942) (coerced plea of guilty).

[48] *Id.*; Herman v. Claudy, 350 U.S. 116 (1956).

[49] Mooney v. Holohan, 294 U.S. 103 (1935), where, however, the Court declined to issue the writ because it was not convinced of the absence of corrective process in the California state courts; Miller v. Pate, 386 U.S. 1 (1967). It should be clear that a case like the last, one of the glories of federal habeas corpus for state prisoners, remains wholly untouched by my proposal.

[50] Pate v. Robinson, 383 U.S. 375 (1966).

Denno,[51] allowing collateral attack by federal habeas corpus on all New York convictions where the voluntariness of a confession had been submitted to the jury without a prior determination by the judge. Whether the case called for the retroactive remedy imposed may be debatable; in my view, the former New York procedure, although surely inferior to that prescribed by the Supreme Court, was a long way from being so shocking that it demanded the hundreds of state *coram nobis* and federal habeas corpus proceedings for past convictions which *Jackson* spawned.[52] Still, one can hardly quarrel with the proposition that if a state does not afford a proper way of raising a constitutional defense at trial, it must afford one thereafter, and this without a colorable showing of innocence by the defendant.

New constitutional developments relating to criminal procedure are another special case. The American Bar Association Report says that these produce a growing pressure for post-conviction remedies.[53] But here the Supreme Court itself has given us the lead. In only a few instances has it determined that its decisions shall be fully retroactive—the right to counsel, *Jackson v. Denno,* equal protection claims,[54] the sixth amendment right to confrontation,[55] and double jeopardy.[56] In most cases the Court has ruled that its new constitutional decisions concerning criminal procedure need not be made available for collateral attack on earlier convictions. These include the extension to the states of the exclusionary rule with respect to illegally seized evidence, [57] the prohibition of comment on a defendant's failure to take the stand.[58] the rules concerning interrogation of persons in custody,[59] the right to a jury trial in state criminal cases,[60] the requirement of counsel at line-ups,[61] and the application of the fourth amendment to non-trespassory wiretapping.[62] While neither a state nor the United States is bound to limit collateral attack on the basis of a new constitutional rule of criminal procedure to what the Supreme Court holds to be demanded, I see no occasion to be holier than the pope.

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[51] 378 U.S. 368 (1964).

[52] Some such second thoughts may be detected in the majority opinion in McMann v. Richardson, 397 U.S. 759, 771-74 (1970), by the writer of *Jackson v. Denno.*

[53] ABA Report, *supra* note 14, at 1. Professor Bator's 1963 belief that "[i]t is not fanciful to suppose that the law of due process for criminal defendants will, in the foreseeable future, reach a resting point, will become stabilized," proved an exceedingly poor prediction. Bator, *supra* note 15, at 523-24.

[54] Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958), *with respect to* Griffin v. Illinois, 351 U.S. 12 (1956) (free transcript on appeal); Daegele v. Kansas, 375 U.S. 1 (1963), *with respect to* Douglas v. California, 372 U.S. 353 (1963) (right to counsel on appeal).

[55] Roberts v. Russell, 392 U.S. 293 (1968), *with respect to* Bruton v. United States, 391 U.S. 123 (1968); Berger v. California, 393 U.S. 314 (1969), *with respect to* Barber v. Page, 390 U.S. 719 (1968).

[56] North Carolina v. Pearce, 395 U.S. 711 (1969), *with respect to* Benton v. Maryland, 395 U.S. 784 (1969).

[57] Linkletter v. Walker, 381 U.S. 618 (1965), *with respect to* Mapp v. Ohio, 367 U.S. 643 (1961).

[58] Tehan v. Schott, 382 U.S. 406 (1966), *with respect to* Griffin v. California, 380 U.S. 609 (1965).

None of these four important but limited lines of decision supports the broad proposition that collateral attack should always be open for the asserted denial of a "constitutional" right, even though this was or could have been litigated in the criminal trial and on appeal. The belief that it should stems mainly from the Supreme Court's construction of the Habeas Corpus Act of 1867[63] and its successors,[64] providing that the writ may issue "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Despite this language no one supposes that a person who is confined, after a proper trial, may mount a collateral attack because the court has misinterpreted a law of the United States;[65] indeed the Supreme Court has explicitly decided the contrary even where the error was as apparent as could be.[66] In such instances we are content that "conventional notions of finality" should keep an innocent man in prison unless, as one would hope, executive clemency releases him.

As a matter of the ordinary reading of language, it is hard to see how the result can be different when a constitutional claim has been rejected, allegedly in error, after thoroughly constitutional proceedings, and the history does not suggest that the statute was so intended.[67] The reason why the Supreme Court did so construe the act in *Brown v. Allen*[68] was, I believe, its consciousness that, with the growth of the country and the attendant increase in the Court's business, it could no longer perform its historic function of correcting constitutional error in criminal cases by review of judgments of state courts and had to summon the inferior federal judges to its aid.[69] Once it was held that state prisoners could maintain proceedings in the federal courts to attack convictions for constitutional error after full and fair proceedings in the state courts, it was hard to read the same statutory words as meaning less for federal prisoners, even though the policy considerations were quite different.[70] And once all this was decided, it was easy to slide into the belief that the states should, or even must, similarly expand their own procedures for collateral attack.

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[59] Johnson v. New Jersey, 384 U.S. 719 (1966), *with respect to* Escobedo v. Illinois, 378 U.S. 478 (1964), *and* Miranda v. Arizona, 384 U.S. 436 (1966).

[60] DeStefano v. Woods, 392 U.S. 631 (1968), *with respect to* Duncan v. Louisiana, 391 U.S. 145 (1968).

[61] Stovall v. Denno, 388 U.S. 293 (1967), *with respect to* United States v. Wade, 388 U.S. 218 (1967), *and* Gilbert v. California, 388 U.S. 263 (1967).

[62] Desist v. United States, 394 U.S. 244 (1969), *with respect to* Katz v. United States, 389 U.S. 347 (1967).

[63] 14 Stat. 385 (1867).

[64] 28 U.S.C. §§ 2241, 2254, 2255 (1964).

[65] *See* H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1238 (1953): "There is a sense, therefore, in which a prisoner is legally detained if he is held pursuant to the judgment or decision of a competent tribunal or authority, even though the decision to detain rested on an error of law or fact."

[66] Sunal v. Large, 332 U.S. 174 (1947).

[67] *See* Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965); Geagan v. Gavin, 181 F. Supp. 466, 468 (1960).

With a commentator's ability to consider policy free from imprisonment by statutory language, I perceive no general principle mandating a second round of attacks simply because the alleged error is a "constitutional" one. We have been conclusorily told there is "an institutional need for a separate proceeding—one insulated from inquiry into the guilt or innocence of the defendant and designed specifically to protect constitutional rights."[71] No empirical data is cited to support this, and so far as concerns proceeding within the same system, it seems fanciful. The supposition that the judge who has overlooked or disparaged constitutional contentions presented on pre-trial motions to suppress evidence or in the course of trial will avidly entertain claims of his own error after completion of the trial and a guilty verdict defies common sense.[72]

The dimensions of the problem of collateral attack today are a consequence of two developments.[73] One has been the Supreme Court's imposition of the rules of the fourth, fifth, sixth and eighth amendments concerning unreasonable searches and seizures, double jeopardy, speedy trial, compulsory self-incrimination, jury trial in criminal cases, confrontation of adverse witnesses, assistance of counsel, and cruel and unusual punishments, upon state criminal trials. The other has been a tendency to read these provisions with ever increasing breadth. The Bill of Rights, as I warned in 1965, has become a detailed Code of Criminal Procedure,[74] to which a new chapter is added every year. The result of these two developments has been a vast expansion of the claims of error in criminal cases for which a resourceful defense lawyer can find a constitutional basis.

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[68] 344 U.S. 443 (1953).

[69] See the excellent statement of this point of view by Judge Wyzanski in Geagan v. Gavin, 181 F. Supp. 466, 469 (1960). *See also* Wright & Sofaer, *supra* note 24, at 897-99.

[70] See the discussion in Kaufman v. United States, 394 U.S. 217, 224-26 (1969). The Kaufman decision, although not the opinion, can be defended on this basis.

[71] *Developments Note, supra* note 9, at 1057.

[72] See Kitch, *The Supreme Court's Code of Criminal Procedure: 1968-1969 Edition*, 1969 Sup. Ct. Rev. 155, 182-83. The *Developments Note* later concedes, at 1059, that "[i]n many cases, the interests described above in a second proceeding can be filled by appellate review" and "[p]erhaps, then, only when appellate review is inadequate—for example because the appeals court cannot look beyond the record—should collateral attack be available." Why not, indeed?

[73] This was forecast by Judge Wyzanski a decade ago in Geagan v. Gavin, 181 F. Supp. 466, 470 (1960).

Any claimed violation of the hearsay rule is now regularly presented not as a mere trial error but as an infringement of the sixth amendment right to confrontation.[75] Denial of adequate opportunity for impeachment would seem as much a violation of the confrontation clause as other restrictions on cross-examination have been held to be.[76] Refusal to give the name and address of an informer can be cast as a denial of the sixth amendment's guarantee of "compulsory process for obtaining witnesses." Inflammatory summations or an erroneous charge on the prosecution's burden of proof[77] become denials of due process. So are errors in identification procedures.[78] Instructing a deadlocked jury of its duty to attempt to reach a verdict[79] or undue participation by the judge in the examination of witnesses can be characterized as violations of the sixth amendment right to a jury trial. Examples could readily be multiplied. Today it is the rare criminal appeal that does *not* involve a "constitutional" claim.

I am not now concerned with the merits of these decisions which, whether right or wrong, have become part of our way of life. What I do challenge is the assumption that simply because a claim can be characterized as "constitutional," it should necessarily constitute a basis for collateral attack when there has been fair opportunity to litigate it at trial and on appeal. Whatever may have been true when the Bill of Rights was read to protect a state criminal defendant only if the state had acted in a manner "repugnant to the conscience of mankind,"[80] the rule prevailing when *Brown v. Allen* was decided, the "constitutional" label no longer assists in appraising how far society should go in permitting relitigation of criminal convictions. It carries a connotation of outrage—the mob-dominated jury, the confession extorted by the rack, the defendant deprived of counsel—which is wholly misplaced when, for example, the claim is a pardonable but allegedly mistaken belief that probable cause existed for an arrest or that a statement by a person not available for cross-examination came within an exception to the hearsay rule. A judge's overly broad construction of a penal statute can be much more harmful to a defendant than unwarranted refusal to compel a prosecution witness on some peripheral element of the case to reveal his address.[81] If a second round on the former is not permitted, and no one suggests it should be, I see no justification for one on the latter in the absence of a colorable showing of innocence.

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[74] H.J. FRIENDLY, *The Bill of Rights as a Code of Criminal Procedure*, in BENCHMARKS 235 (1967).

[75] This is true despite the holding in California v. Green, 399 U.S. 149 (1970), that the confrontation clause and the hearsay rule are not wholly congruent in scope.

[76] Smith v. Illinois, 390 U.S. 129 (1968).

[77] *Cf. In re* Winship, 397 U.S. 358 (1970).

[78] Stovall v. Denno, 388 U.S. 293 (1967); Simmons v. United States, 390 U.S. 377 (1968); Foster v. California, 394 U.S. 440 (1969).

[79] Allen v. United States, 164 U.S. 492, 501 (1896).

[80] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

It defies good sense to say that after government has afforded a defendant every means to avoid conviction, not only on the merits but by preventing the prosecution from utilizing probative evidence obtained in violation of his constitutional rights, he is entitled to repeat engagements directed to issues of the latter type even though his guilt is patent. A rule recognizing this would go a long way toward halting the "inundation;" it would permit the speedy elimination of most of the petitions that are hopeless on the facts and the law, themselves a great preponderance of the total, and of others where, because of previous opportunity to litigate the point, release of a guilty man is not required in the interest of justice even though he might have escaped deserved punishment in the first instance with a brighter lawyer or a different judge.

III

This is an appropriate place to consider how far the recent ABA Report on Post-Conviction Review helps toward achieving what I think is the proper result. I submit it works in exactly the wrong direction.

A reader taking only a casual look at the Report might regard it as going a long way in the direction of promoting finality. The Introduction proclaims:

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[81] While the "harmless error" rule of Chapman v. California, 386 U.S. 18 (1967), and Harrington v. California, 395 U.S. 250 (1969), affords relief against constitutional claims on immaterial points, the test on collateral attack generally should be not whether the error could have affected the result but whether it could have caused the punishment of an innocent man. Note, *Harmless Constitutional Error: A Reappraisal*, 83 HARV. L. REV. 814 (1970), fails to distinguish between the problem on direct appeal and on collateral attack.

> A general principle underlying these standards is that once an issue of fact or law has been finally determined, that adjudication ought to be final and binding.[82]

Section 6.1 states: "Unless otherwise required in the interest of justice, any grounds for post-conviction relief as set forth in section 2.1 which have been fully and finally litigated in the proceedings leading to the judgment of conviction should not be relitigated in post-conviction proceedings."[83] However, what would otherwise be the salutary effect of this is largely destroyed by the definition, § 6.1(a) (ii), that a question has been "fully and finally litigated" only "when the highest court of the state to which a defendant can appeal as of right has ruled on the merits of the question." If, for example, the defendant did not appeal because his lawyer thought that the trial court was correct or that any error would be found immaterial or that he would be convicted on a retrial, the issue remains open for collateral attack under the ABA draft unless there has been what is called an "abuse of process." Moreover, absent "abuse of process," claims that might have been but were not raised even in the trial court also remain open. The "abuse of process" exception, § 6.1(c), is put in terms of "deliberately and inexcusably" failing to pursue the point. While we are not told exactly what these adverbs mean, they clearly refer to something considerably beyond a negligent or even a considered decision not to utilize an available remedy; the state does not bring itself within them even by showing a deliberate failure *simpliciter* but must demonstrate "a deliberate failure to present an issue *with an intention to present it later.*"[84]

Save for the rare instance when the state is known to have evidence to refute a claim which it may not have later, it is exceedingly hard to visualize a case where a defendant or his lawyer would deliberately lay aside a meritorious claim so as to raise it after the defendant was jailed. It is even more difficult to imagine how the state could ever prove this. But if these are the only cases in which collateral attack is precluded by failure to raise a claim or to appeal from its denial, the ABA Report, while professing devotion to finality, would in fact work a wholesale repudiation of it.[85] The explanation, in a somewhat different context, that "since the inquiry required to establish abuse of process is far more burdensome than that required to determine the validity of the claim, and since most applications do not present valid claims, it is simpler and more expeditious to reach the merits of claims before consideration of any suggestions of abuse of process,"[86] does not explain at all. The high proportion of invalid claims would seem rather to be a reason for imposing measures to protect the courts from the heavy burden of considering them,[87] and "the inquiry required to establish abuse of process" is "burdensome" only because the Report gives the term a meaning all its own.

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[82] ABA REPORT, *supra* note 14, at 3.

[83] *Id.* at 85.

[84] *Id.* at 88 (emphasis added).

[85] This is hardly surprising since the Reporter, Professor Curtis Reitz, has long been an enthusiastic advocate of collateral attack. *See* the articles cited in note 126 *infra.*

Meaningful discussion of the preclusive effect of failing to raise a point at trial or pursue an appeal has been bedevilled by the concept of waiver. "Waiver" has been well said to be "a troublesome term in the law."[88] The ABA Report concedes that "[t]he term is subject to multiple meanings or shades of meanings which can result in confusion in communication and, perhaps, in thought."[89] Not only they can, they do. The initial and still the most cited use of this concept in the field with which we are here concerned, that by Mr. Justice Black in *Johnson v. Zerbst*,[90] was wholly appropriate. The sixth amendment, as he read it, required the provision of counsel; none had been provided; therefore the writ should issue unless the defendant had waived his right. Similar considerations are applicable to coercive interrogation or illegal search. The Constitution protects against compelled self-incrimination; thus an incriminating statement made under compulsion cannot be used over timely objection unless before answering the defendant had waived his privilege not to speak. It protects also against unreasonable searches; if there has been a search of a home without a warrant, the fruits thus cannot be used over objection unless the defendant has consented to the search. But it is a serious confusion of thought to transpose this doctrine of substantive law into the courtroom.[91] At that stage the defendant's constitutional right is to have a full and fair opportunity to raise his claims on trial and appeal and the assistance of counsel in doing so. There is no need to find a "waiver" when the defendant or his counsel has simply failed to raise a point in court, since the state has not deprived him of anything to which he is constitutionally entitled.[92]

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[86] ABA Report, *supra* note 14, at 36.

[87] One item in the ABA Report which I applaud is the inclusion as a ground of collateral attack "that there exists evidence of material facts, not theretofore presented and heard, which require vacation of the conviction or sentence in the interest of justice," *id.* § 2.1(a)(iv), at 32, if this were limited, as it obviously should be, to facts which could not have been presented in the exercise of due diligence. This would end the anomaly that newly discovered evidence proving or strongly tending to prove the defendant's innocence is not generally a ground for obtaining a new trial unless the evidence is discovered within a stated short period or was deliberately suppressed by the state, whereas, for example, a defendant who has voluntarily confessed guilt can obtain collateral relief on a plea that the court erred in finding full compliance with *Miranda*. *See* Bator, *supra* note 15, at 509. In this way the ABA Report recognizes how invalid the obeisance to "constitutional" claims has become.

[88] 5 Williston, Contracts § 678, at 239 (3d ed. 1961).

[89] ABA Report, *supra* note 14, at 88.

[90] 304 U.S. 464 (1938).

If the only available choices were to preclude collateral attack in all cases where the issue was or could have been raised at trial and on appeal except in the four special situations heretofore enumerated, or to allow it under the scant limitations provided in the ABA Report, the former would be preferable. But, as indicated, I would also allow an exception to the concept of finality where a convicted defendant makes a colorable showing that an error, whether "constitutional" or not,[93] may be producing the continued punishment of an innocent man.

IV

Before going further I should clarify what I mean by a colorable showing of innocence. I can begin with a negative. A defendant would not bring himself within this criterion by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained. Many offenders, for example, could not be convicted without the introduction of property seized from their persons, homes or offices. On the other hand, except for the unusual case where there is an issue with respect to the defendant's connection with the property, such evidence is the clearest proof of guilt, and a defendant would not come within the criterion simply because the jury might not, or even probably would not, have convicted without the seized property being in evidence. Perhaps as good a formulation of the criterion as any is that the petitioner for collateral attack must show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded, or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.[94]

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[91] The fountainhead of this error is Fay v. Noia, 372 U.S. 391, 439-40 (1963).

[92] Sunal v. Large, 332 U.S. 174, 177-78 (1947).

[93] *See* note 87 *supra*.

[94] For an example that would have met this criterion if it had arisen by way of collateral attack, see United States v. Miller, 411 F.2d 825 (2d Cir. 1969)—one of the half dozen cases where, in eleven years of judicial experience, I entertained real doubt about a defendant's guilt. On the new trial the defendant testified (as he had not on the first) and was acquitted.

As indicated, my proposal would almost always preclude collateral attack on claims of illegal search and seizure. This is in sharp contrast to the decision in *Kaufman v. United States,*[95] where the Supreme Court adopted the view of a minority of the courts of appeals.[96] Here I am merely following a trail blazed some years ago by Professor Amsterdam,[97] who surely cannot be accused of lack of sympathy for the criminal defendant. He urged that, subject to certain minor qualifications,[98] society not only has no interest in the collateral enforcement of a claim to suppression of illegally obtained evidence but "has the strongest sort of interest against its enforcement."[99] So far as the defendant is concerned, the exclusionary rule is a bonanza conferring a benefit altogether disproportionate to any damage suffered, not so much in his own interest as in that of society.[100] I cannot do better than to quote: "The rule is unsupportable as reparation or compensatory dispensation to the injured criminal; its sole rational justification is the experience of its indispensability in 'exert[ing] general legal pressures to secure obedience to the Fourth Amendment on the part of . . . law enforcing officers.' "[101] "As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance."[102] And "if there is one class of cases that I would hazard to say is very probably beyond the point of diminishing returns, it is the class of search and seizure claims raised collaterally. For, so far as the law enforcement officer or the prosecutor is concerned, the incidence of such cases is as unforeseeable as the flip of a coin; the option to raise the claim directly lies solely with the defense."[103]

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[95] 394 U.S. 217 (1969).

[96] *Id.* at 220-21 nn. 3 & 4.

[97] Amsterdam, *supra* note 15, at 378.

[98] These are considered in an elaborate footnote, *id.* at 391-92. I would add the rare case where the defendant's connection with the seized evidence was tenuous and the other evidence was thin.

[99] *Id.* at 388.

[100] *See* United States v. Dunnings, 425 F.2d 836, 840 (2d Cir. 1969). While "guilty defendants . . . are entitled to have the integrity of their persons and homes protected," Griffiths, *Ideology in Criminal Procedure, or a Third Model of the Criminal Process,* 79 YALE L.J. 359, 385 (1970), in Hohfeldian theory the consequence of this should be an action against the transgressor, not immunity from effective prosecution. The Supreme Court has consistently stressed that "the exclusionary rule . . . is calculated to prevent, not to repair," Elkins v. United States, 364 U.S. 206, 217 (1960). *See also* Linkletter v. Walker, 381 U.S. 618, 636-37 (1965).

[101] Amsterdam, *supra* note 15, at 388-89. The inner quotation is from Mr. Justice Frankfurter's dissent in Elkins v. United States, 364 U.S. 206, 235 (1960). The efficacy of the exclusionary rule as a deterrent has been questioned in a remarkable article in this *Review.* Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970).

[102] Amsterdam, *supra* note 15, at 389.

I find no adequate answer in the majority opinion in *Kaufman v. United States* to these arguments, which Mr. Justice Black recounted in dissent with characteristic vigor and persuasiveness.[104] The majority compendiously tells us that "adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief."[105] This gives everything but the why. If a defendant represented by counsel has had one full and fair opportunity to raise a search and seizure claim, why is there any more need for continuing possibility to litigate this issue than any other? We are instructed that "[t]he availability of post-conviction relief serves significantly to secure the integrity of proceedings at or before trial and on appeal."[106] If "integrity" is being used in its sense of a "quality or state of being complete or undivided," just the opposite is true. I suppose the word is being used in its other sense of "utter sincerity, honesty, and candor," but even so the conclusion is hard to accept. As Mr. Justice Harlan has observed, *Kaufman* seems to rest on the idea that "the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."[107] This is an exceedingly serious indictment of the lower federal courts, for which I perceive no adequate factual basis. With today's awareness of constitutional rights, flagrant cases of police misconduct in search and seizure will rarely escape detection and correction in the trial or appellate process, even with the most slothful of defense counsel and the most careless of judges. The non-frivolous fourth amendment cases likely to give rise to collateral attack are those near the borderline, presenting hard questions of the meaning or application of Supreme Court decisions. Yet these are the cases where the deterrent function of the exclusionary rule is least important,[108] and the argument for limiting collateral attack to instances, almost never present in search and seizure, where constitutional error may have led to the conviction of an innocent man is the strongest.[109]

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[103] *Id.* at 390.

[104] 394 U.S. at 231-42.

[105] *Id.* at 226.

[106] *Id.* at 229.

[107] Desist v. United States, 394 U.S. 244, 262-63 (1969) (dissenting opinion).

[108] *See* H.J. Friendly, Benchmarks 260-61 (1967), suggesting that even at trial the exclusionary rule should be limited to exclusion of "the fruit of activity intentionally or flagrantly illegal."

Another type of claim, certain to be a prodigious litigation breeder, concerning which I would forbid collateral attack in the absence of a colorable showing of innocence, consists of cases arising under *Miranda v. Arizona.*[110] Consider, for example, one of the knottiest problems in the application of that case, namely, whether questioning by law enforcement officers without the *Miranda* warnings took place "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[111] Almost all defense lawyers, indeed many defendants themselves, must be aware of the Supreme Court's new requirements about questioning in the station house. But suppose the lawyer does not know that *Miranda* may apply prior to the defendant's arrival there, or that he does not correctly understand what the field of application is, or that a court properly seized of the problem has held *Miranda* to be inapplicable and this is arguably wrong under existing or later decisions. This is generally not "the kind of constitutional claim that casts some shadow of doubt" upon the defendant's guilt.[112] The mere failure to administer *Miranda* warnings in on-the-scene questioning creates little risk of unreliability, and the deterrent value of permitting collateral attack goes beyond the point of diminishing returns for the same reasons developed in Professor Amsterdam's discussion of search and seizure. I would take the same view of collateral attack based on claims of lack of full warnings or voluntary waiver with respect to station-house questioning where there is no indication of the use of methods that might cast doubt on the reliability of the answers.

The confession involuntary in the pre-*Miranda* sense helps to illustrate where I would draw the line. In a case where the prosecution had no other substantial evidence, as, for example, when identification testimony was weak or conflicting and there was nothing else, I would allow collateral attack regardless of what happened in the original proceedings. Such a case fits the formula that considerations of finality should not keep a possibly innocent man in jail. I would take a contrary view where the state had so much other evidence, even though some of this was obtained as a result of the confession,[113] as to eliminate any reasonable doubt of guilt.

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[109] The *Developments Note, supra* note 9, at 1064-66, would justify *Kaufman* on the basis that the petitioner had not succeeded in having his claim considered on his appeal, and would limit the decision accordingly. Although appellate counsel had evidently thought the point too lacking in merit to raise, Kaufman himself had brought the matter to the attention of the court of appeals, 394 U.S. at 220 n.3, but that court did not discuss it. *See* 350 F.2d 408 (8th Cir. 1965) and 394 U.S. at 220 n.3. There is reason to think that Mr. Justice Brennan would accept the proposed limitation. *See* 394 U.S. at 227 n.8 and the quotation from Judge Wright's dissent in Thornton v. United States, 368 F.2d 822, 831 (D.C. Cir. 1966), at 394 U.S. 230-31. *Cf.* Kapatos v. United States, — F.2d — (2d Cir. 1970). My position is that opportunity to appeal should be enough.

[110] 384 U.S. 436 (1966). I am not here considering the effect of 18 U.S.C. § 3501 (1964).

[111] 384 U.S. at 444.

[112] Kaufman v. United States, 394 U.S. 217, 242 (1969). *See* Johnson v. New Jersey, 384 U.S. 719, 730 (1966).

Neither your patience nor mine would tolerate similar examination of the application of my proposal to all constitutional claims. Such soundings as I have taken convince me that in other contexts as well the proposal would fully protect the innocent, while relieving the courts of most of the collateral challenges with which they are now unnecessarily burdened.

V

Assuming that collateral attack by federal prisoners should be restricted as I have suggested, what should be done with respect to the far more numerous prisoners held by the states, in whose hands the maintenance of public order largely rests?[114] The subject has two aspects: The first is whether any changes should be made with respect to federal habeas corpus for state prisoners. The second is whether, in formulating their own procedures, the states should do what they would deem appropriate in the absence of the likelihood of a federal proceeding or should allow collateral attack in every case where the eyes of the federal big brother may penetrate.

At first blush it might seem that to whatever extent collateral attack on criminal judgments should be restricted within a unitary system, it ought to be even more so when one system operates on the judgments of another. The case to the contrary rests primarily on the practical inability of the Supreme Court to correct "constitutional" errors in state criminal proceedings through the appellate process.[115] There is, of course, no such impediment when the issue is an important rule of criminal procedure as contrasted to its application in a particular case. The attack on the New York procedure concerning confessions is a good illustration;[116] although the decision chanced to be made in federal habeas corpus, it could have been made just as well when the issue had been presented eleven years earlier on direct review,[117] and the problem would surely have again arisen in that form if the *Jackson* case had not come along. Almost all the Court's most important decisions on criminal procedure, for example, those relating to equal protection for indigent defendants,[118] comment on a defendant's failure to testify,[119] the extension to the states of the exclusionary rule with respect to illegally seized evidence,[120] confrontation,[121] and custodial interrogation,[122] have been made on direct review of state judgments.[123]

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[113] The paradigm is where a confession of homicide leads to the discovery of a body bearing pieces of the defendant's hair, nails or clothing, or of weapons covered with defendant's fingerprints.

[114] *See* H.J. FRIENDLY, BENCHMARKS 243 & n.40 (1967).

[115] *See* text at note 68 *supra*.

[116] Jackson v. Denno, 378 U.S. 368 (1964).

The argument for federal habeas corpus with respect to prisoners who have had a full and fair hearing and determination of their constitutional claims in the state courts thus must relate to two other categories of constitutional claims—disputed determinations of fact and the application of recognized legal standards. The contention is that only federal judges, with the protection of life tenure and supposedly greater knowledge of and sympathy for the Supreme Court's interpretations of the Constitution, can be trusted with the "final say" in such matters, although great deference to state factual determinations is required.[124] While, if I were to rely solely on my own limited experience, I would think the case for the final federal say has been considerably exaggerated,[125] I do not wish to add to the large amount of literature on this point.[126]

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[117] Stein v. New York, 346 U.S. 156 (1953).

[118] Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963).

[119] Griffin v. California, 380 U.S. 609 (1965).

[120] Mapp v. Ohio, 367 U.S. 643 (1961).

[121] Pointer v. Texas, 380 U.S. 400 (1965).

[122] Miranda v. Arizona, 384 U.S. 436 (1966).

[123] Others, such as Gideon v. Wainwright, 372 U.S. 335 (1963), applying the requirement of appointed counsel to the states, and Malloy v. Hogan, 378 U.S. 1 (1964), applying the fifth amendment privilege against self-incrimination to them, have been made on review of state post-conviction attacks. The only significant decisions setting out new rules of criminal procedure (other than procedure in habeas itself) which were made on federal habeas for state prisoners appear to have been Jackson v. Denno, 378 U.S. 368 (1964), and Sheppard v. Maxwell, 384 U.S. 333 (1966).

[124] 28 U.S.C. § 2254(d) (1964).

[125] My observation of the work of the excellent state courts of New York, Connecticut and Vermont does not suggest that federal determination of such questions is notably better. In the vast majority of cases we agree with the state courts, after a large expenditure of judges' and lawyers' time. In the few where we disagree, I feel no assurance that the federal determination is superior. When I am confident that the issue has received real attention and the state trial and appellate judges have been in accord among themselves, I see no sufficient reason to elevate my views over theirs in a close case. *See* United States *ex rel.* Romeo v. McMann, 418 F.2d 860, 866 (2d Cir. 1969) (concurring opinion). The main difficulty is when one cannot be sure that the state courts, or at any rate the state appellate courts, have focused on the issue. Greater writing of opinions, however brief and informal, would alleviate the problem.

[126] *See, e.g.*, Bator, *supra* note 15; Brennan, *Some Aspects of Federalism*, 39 N.Y.U.L. Rev. 945 (1964); Hart, *Foreword: The Time Chart of the Justices, The Supreme Court,*

Assuming the final federal say is here to stay, is there any way to accelerate it and thereby avoid the upsetting of a conviction by a federal court when the state can no longer conduct a retrial? One way would be to route appeals from state criminal decisions, whether on direct or on collateral attack, to a federal appellate tribunal—either the appropriate court of appeals or a newly created court[127]—and preclude federal habeas corpus as to issues for which that remedy is available. Although a number of different models could be visualized, one possibility would be this: After a state conviction or denial of post-conviction attack had become final, in those cases where the attack was not upon the constitutionality of a state rule but upon state fact-finding or application of a federal constitutional rule,[128] a petition for review would lie not to the Supreme Court but to the federal appellate court.[129] The standard for granting such review would be quite different from the Supreme Court's on certiorari. It would be more like what the courts of appeals now apply with respect to certificates of probable cause in state prisoner cases—not whether the issue was important to the law but whether the appeal raised a substantial claim of violation of constitutional rights. The criterion for such *appellate* review would thus be considerably more liberal than I have proposed with respect to *collateral attack* within a unitary system. When a prisoner had failed to seek such review, or the appellate court had declined to grant it or had decided adversely, federal habeas corpus with respect to any issue that could have been so presented would be foreclosed, except for those cases where I would preserve collateral attack within a unitary system, and for

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1958 Term, 73 HARV. L. REV. 84, 104 (1959); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960); Wright & Sofaer, *supra* note 24; *Developments Note*, *supra* note 9.

[127] One argument against utilizing the existing courts of appeals is that they are already overburdened. But many of the cases that would come to them under this proposal reach them now in federal habeas, either on applications for certificates of probable cause or for full-dress argument when such certificates have been granted. Considerations in favor of utilizing the existing courts are their geographical convenience, their greater knowledge of relevant state procedures and the quality of particular state judges, the difficulty in manning a specialized court, and the historic prejudice against tribunals of specialized jurisdiction. On the other side are the possibly greater acceptability of review by a "super court" to the highest courts of the states, *see* note 130 *infra*, and the uniformity that would result from review by such a court.

[128] Alternatively, a petition to review in the federal appellate court would be required whenever the attack was based on procedural due process, including the selectively incorporated provisions of the Bill of Rights, as distinguished from substantive attack on a state criminal statute, *e.g.*, as violating the first amendment.

[129] Any legislation would include familiar procedures for transfer where application had been made to the wrong court.

them only if the state had not provided a means for collateral attack in its own courts. Where it did, the prisoner must use it, and final state decisions would be reviewable in the same manner as proposed for state decisions on direct appeal.

Such a scheme would preserve the original understanding that judgments of the highest courts of the states are to be re-examined only by a federal appellate court rather than at nisi prius.[130] More important, it would force the prisoner to use his federal remedy while the record is reasonably fresh and a retrial is practical. While the proposal depends on the state court's having made an adequate record and findings, the court of appeals could remand where it had not. Perhaps the most serious objection is that unless review by the Supreme Court were severely restricted, or stays in non-capital cases pending application for such review were forbidden, insertion of an appeal to a lower federal appellate tribunal would further postpone the date when a convicted state prisoner begins to serve his sentence. I advance the suggestion only as one warranting discussion, to take place in the larger context of whether the time has not come when the Supreme Court should be relieved of some of its burdens.

Whether there is merit in this proposal or not, I would subject federal habeas for state prisoners to the same limitations that I have proposed for federal prisoners. With the four exceptions noted at the outset, I see no sufficient reason for federal intervention on behalf of a state prisoner who raised or had an opportunity to raise his constitutional claim in the state courts, in the absence of a colorable showing of innocence. It is sufficient if the benefit of fact-finding and the application of constitutional standards by a federal judge is available in cases of that sort.

Assuming that nothing happens on the federal scene, whether through congressional inertia or otherwise, what should the states do with respect to their own systems for collateral attack on convictions? In my view, if a state considers that its system of post-conviction remedies should take the lines I have proposed, it should feel no obligation to go further[131] simply because this will leave some cases where the only post-conviction review will be in a federal court.

I realize this may seem to run counter to what has become the received wisdom, even among many state judges and prosecutors.

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[130] On the other hand, some judges with whom I have discussed this believe that the highest state courts would find it even more offensive to have their constitutional decisions reviewed by the existing federal courts of appeals; if so, this might argue that a new "super court" would be preferable if this procedure is to be used at all. *See* note 127 *supra*.

[131] This is recognized in the ABA REPORT, *supra* note 14, at 86.

One part of the angry reaction of the Conference of State Chief Justices to *Brown v. Allen*[132] was the recommendation that:

> State statutes should provide a postconviction process at least as broad in scope as existing Federal statutes under which claims of violation of constitutional right asserted by State prisoners are determined in Federal courts under Federal habeas corpus statutes.[133]

The recommendation for broadening state post-conviction remedies was doubtless salutary in 1954 when many states had few or none.[134] As my remarks have made evident, I recognize a considerable area for collateral attack; indeed, I think there are circumstances, such as post-trial discovery of the knowing use of material perjured evidence by the prosecutor or claims of coercion to plead guilty, where failure to provide this would deny due process of law.[135] My submission here is simply that when a state has done what it considers right and has met due process standards, it should not feel obliged to do more *merely* because federal habeas may be available in some cases where it declines to allow state collateral attack.

The argument against this is that making the state post-conviction remedy fully congruent with federal habeas for state prisoners (1) will economize judicial time, (2) will reduce state-federal conflict, and (3) will provide a record on which the federal judge can act. Except for the few cases where pursuit of the state remedy will result in a release, absolute or conditional, the first argument rests on the premise that many state prisoners will accept the state's adverse judgment. I know of no solid evidence to support this;[136] my impression is that prisoners unsuccessful in their post-conviction applications through the state hierarchy almost inevitably have a go at federal habeas, save when their sentences have expired. In the great majority of cases the job simply has to be done twice. Pleasant though it is for federal judges to have the task initially performed by their state brethren, the over-all result is to increase the claims on judicial and prosecutorial time. The conflict that would otherwise exist is avoided only in the rare instances where the state itself grants release and, more important, in cases where it finds the facts more favorably to the prosecution than a federal judge would do independently, but the latter respects the state determination.[137] This last is also the real bite in the point about record making.[138] It is, of course, somewhat ironic that after federal habeas has been justified in part on the basis of the superiority of fact determinations by the federal judge, the states should be urged to elaborate their post-conviction remedies so as to enable him to avoid the task. Moreover, conflict is even more acrid when a federal judge rejects not simply a state determination after trial and appeal but also its denial of post-conviction relief.[139] It should be remembered also that my proposal contemplates state post-conviction record making when there is new evidence that was not available at trial, and that the state trial or pre-trial proceedings will contain a record whenever the point was then raised. The problem areas would thus largely be cases where the point could have been but was not raised at the state trial.[140] Be all this as it may, such considerations are for the state to weigh against what it may well consider an excessive expenditure of effort in dealing with collateral attack. While the immediate result of a state's failure to provide the full panoply of post-conviction remedies now available in federal habeas would be an increase in the burdens on the federal courts, this might afford the impetus necessary to prod Congress into action.

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[132] 344 U.S. 443 (1953).

[133] H.R. Rep. No. 1293, 85th Cong., 2d Sess. 7 (1958).

[134] See the 1958 report of the Burton Committee, quoted in part in Case v. Nebraska, 381 U.S. 336, 339 (1965) (Clark, J., concurring).

[135] *Cf.* Mooney v. Holohan, 294 U.S. 103 (1934); Young v. Ragen, 337 U.S. 235 (1949).

[136] Mr. Justice Clark said in Case v. Nebraska, 381 U.S. 336, 340 (1945) (concurring opinion), that it was reported that federal applications from state prisoners in Illinois "dropped considerably after its [post-conviction] Act was adopted." One would expect that to happen while the new state remedies were being exhausted; whether the decrease was other than temporary is another matter. The district courts for Illinois had 286 state prisoner petitions in the year ended June 30, 1969. 1969 Annual Report, *supra* note 5, at 211. The nationwide figures cited above, *see* text and note at note 5 *supra*, show constant increases despite greatly expanded state post-conviction remedies.

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[137] Presumably this is what Mr. Justice Brennan meant in saying, in Case v. Nebraska, 381 U.S. 336, 345 (1945) (concurring opinion), "Greater finality would inevitably attach to state court determinations of federal constitutional questions, because further evidentiary hearings on federal habeas corpus would, if the conditions of Townsend v. Sain were met, prove unnecessary."

[138] Note Mr. Justice Brennan's statement in Case v. Nebraska, 381 U.S. 336, 345 (1945), that, "nonmeritorious claims would be fully ventilated, making easier the task of the federal judge if the state prisoner pursued his cause further."

[139] For an example see United States *ex rel.* Stephen J.B. v. Shelly, 430 F.2d 215 (2d Cir. 1970), where a district judge, without hearing any further evidence, annulled the unanimous holdings of 13 New York judges, culminating in an opinion by the Court of Appeals, People v. Stephen J.B., 23 N.Y.2d 611, 246 N.E.2d 344, 298 N.Y.S.2d 489 (1969), on a close question relating to *Miranda*—and this in a case where the defendant had been placed on probation and, because he was a juvenile, his conviction had no civil consequences!

[140] As to these I would favor an amendment to 28 U.S.C. § 2254 (1964) which would make it clear that the rule of Henry v. Mississippi, 379 U.S. 443 (1965), applies to federal habeas for state prisoners, without any of the doubts now existing, either there or on direct appeal, in regard to the need of personal participation by the defendant in feasance or nonfeasance by his attorney. *See* Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187.

VI

The final question is whether this or any other proposal for reform is vain imagining since any change in the Supreme Court's construction of the Habeas Corpus Act of 1867 would be unconstitutional.

Taking federal prisoners first, I recognize the existence of some cases where, quite apart from the suspension clause, refusal to provide post-conviction relief would be a denial of due process. My proposal goes well beyond these; it takes care of all challenges to the validity of the criminal process itself including lack of counsel, of all cases where the defendant poses constitutional claims he could not practically have advanced before conviction or where proper procedures were not provided for doing this, of constitutional claims resulting from changes in the rules of the game to whatever extent the Supreme Court indicates, and, finally, of all other constitutional claims subject only to a colorable showing of innocence. The question is whether limitation of habeas for federal prisoners to these cases, plainly consistent with due process as I consider it to be, runs afoul of the framers' mandate that:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.[141]

It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did.[142] The argument against such a moderate turning back from these decisions as I have proposed thus must rest on the extended historical exercise in *Fay v. Noia*, culminating in the statement:

> Thus, at the time that the Suspension Clause was written into our Federal Constitution and the first Judiciary Act was passed conferring habeas corpus jurisdiction upon the federal judiciary, there was respectable common-law authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to fundamental law.[143]

It has now been shown with as close to certainty as can ever be expected in such matters[144] that, despite the "prodigious research" evidenced by the *Noia* opinion, the assertion that habeas as known at common law permitted going behind a conviction by a court of general jurisdiction is simply wrong. The very historians cited in the opinion disagree with any such conclusion.[145] *Bushell's Case*,[146] the only authority cited that gives even slight support to the thesis espoused in the elaborate dictum, is wholly inadequate to sustain the view that English courts used the writ to penetrate convictions of felony and treason and seek out violations of Magna Carta.[147]

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[141] U.S. CONST. art. I, § 9, cl. 2.

[142] A contrary view is taken, quite unconvincingly, in *Developments Note*, *supra* note 9, at 1269.

[143] 372 U.S. at 405.

While I do not share the anticipations of some that the Burger Court will indulge in wholesale overrulings in the field of criminal procedure, it should not feel bound by an historical essay, that now appears to have been clearly erroneous, on a point not in issue and as to which the Court consequently did not have the benefit of an adversary presentation.[148] It is quite unrealistic to suppose that the other Justices had the time or, in view of the irrelevance of the discussion, the incentive to subject this historical essay to critical analysis, and one would hope that even its distinguished author might be willing to reconsider it in the light of what disinterested research has shown. Indeed, the last relevant pronouncement of the Warren Court on the subject seemed to recognize that the Act of 1867 "expanded" the writ *beyond* its status at common law, and that it is Congress that "has determined that the full protection of their [federal and state prisoners'] constitutional rights requires the availability of a mechanism for collateral attack."[149] What Congress has given, Congress can partially take away.

I likewise do not quail before another statement[150] that if the provision in 28 U.S.C. § 2255 (1964) with respect to repetitive applications by federal prisoners were "construed to derogate from the traditional liberality of the writ of habeas corpus," it "might raise serious constitutional questions." For the reason just indicated I do not regard the questions as serious, but even if they were, Congress has not merely the right but sometimes the duty to raise such questions. To seek legislative consideration of a proposal to cut back on the Supreme Court's expansive construction of the Act of 1867 but leave the Great Writ with a much broader scope than anything of which the framers could have dreamed would not be asking nearly so much as President Roosevelt did in his famous statement that Congress should not "permit doubts as to constitutionality, however reasonable, to block the suggested legislation."[151] It is surely not irrelevant in this context that the valiant champion of every syllable of the Constitution would confine collateral attack to a claim by a defendant which "casts some shadow of doubt upon his guilt."[152]

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[144] Oaks, *supra* note 13, at 456-68.

[145] *Id.* at 459 & n.47. *See also* Rubinstein, *Habeas Corpus as a Means of Review*, 27 Mod. L. Rev. 322, 326 (1964): "Superior and other common law courts enjoy, therefore, an almost complete immunity from review on habeas corpus."

[146] 124 Eng. Rep. 1006 (C.P. 1670).

[147] As Professor Oaks has pointed out, any such reading of the opinion in *Bushell's Case* would bring it into conflict with three fundamental principles of seventeenth and eighteenth century habeas corpus law—that a general return that the prisoner had been committed for treason or felony was sufficient; that petitioners were forbidden to challenge the truth of particulars set out in the return; and that once a person had been convicted by a superior court of general jurisdiction, a court seized of a habeas petition could not go behind the conviction for any purpose other than to verify the jurisdiction of the convicting court. Oaks, *supra* note 13, at 468.

[148] *Id.* at 458.

[149] Kaufman v. United States, 394 U.S. 217, 221, 228 (1969).

[150] Sanders v. United States, 373 U.S. 1, 11-12 (1963).

If my proposal with regard to federal prisoners is thus constitutional, the same is a fortiori true concerning federal habeas for state prisoners.[153] And the suggestion that the states need go no further with respect to their own post-conviction procedures is even more clearly so. The suspension clause applies only to the federal government and, while complete denial of post-conviction remedies by a state would violate the due process clause of the fourteenth amendment in some cases, nothing in the Constitution requires a state to allow collateral attack simply because Congress has authorized federal habeas corpus to challenge the state conviction.[154] Although the state is bound by the supremacy clause to honor all constitutional guarantees, it is not bound to honor them more than once.

My submission, therefore, is that innocence should not be irrelevant on collateral attack even though it may continue to be largely so on direct appeal. To such extent as we have gone beyond this, and it is an enormous extent, the system needs revision to prevent abuse by prisoners, a waste of the precious and limited resources available for the criminal process, and public disrespect for the judgments of criminal courts.

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[151] 79 CONG. REC. 13449 (1935), *cited in* D. MORGAN, CONGRESS AND THE CONSTITUTION 6 (1966).

[152] Kaufman v. United States, 394 U.S. 217, 235 (Black, J., dissenting).

[153] *See* Pollack, *supra* note 33, at 63 & n.73. *But see Developments Note, supra* note 9, at 1272-74. I indicate no view on the current status of *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807), discussed in Paschel, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605.

[154] Case v. Nebraska, 381 U.S. 336 (1965), does not decide otherwise, although on the facts—a claim of a coerced guilty plea—denial of a post-conviction remedy could well have violated due process. *See* Sandalow, *supra* note 140, at 210-15.

Wainwright v. Sykes: The Lower Federal Courts Respond†

By SAUL B. GOODMAN*
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Introduction

A defendant is brought to trial in a state criminal court. During his trial, the defendant fails to abide by a state procedural rule mandating that a particular constitutional claim be raised at a specific point during the judicial proceedings. The defendant is convicted and, on appeal, attempts to raise the constitutional claim that he should have raised at trial. The state supreme court finds that the defendant's violation of the state procedure bars him from asserting the constitutional claim on appeal. On direct review, the Supreme Court of the United States similarly declines to reach the merits of the constitutional claim because it finds that the state procedure is an adequate and independent state ground precluding direct review. The defendant, now incarcerated in a state prison, files a petition for a writ of habeas corpus in a United States district court based on the same constitutional claim he attempted to raise on appeal. Is the defendant eligible for the writ and, if so, under what circumstances?

This question was recently addressed in *Wainwright v. Sykes*,[1] where the Supreme Court, following a path established by earlier Burger Court cases, sharply limited its suggestion in *Fay v. Noia*[2] that such a prisoner could obtain habeas relief unless he had "deliberately bypassed" the state procedural rule. The Court in *Sykes* held instead that a state prisoner having committed a state procedural default[3] in raising a *Miranda* claim was eligible for federal habeas relief only if he could demonstrate both "cause" for his failure to raise the claim in accordance with state procedures and "actual prejudice" arising from the constitutional claim. The *Sykes* Court, however, reserved for future resolution the precise definition of the two prongs of the "cause-and-prejudice" test.

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† In this Article, the authors, though recognizing that the feminine gender may be equally appropriate, use the masculine gender for personal pronouns. This convention is adopted for the purpose of style and consistency.

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[1] 433 U.S. 72 (1977).

[2] 372 U.S. 391 (1963).

[3] As the term is used in this Article, a "procedural default" means a defendant's failure to raise a constitutional claim in accordance with a procedural rule that is sufficient

This Article is an examination of the cause-and-prejudice test. It begins with a brief overview of the Supreme Court jurisprudence culminating in *Sykes* and the issues left unresolved in that opinion. The Article then explores three theoretical definitions of "actual prejudice" and the lower court cases applying the term. This survey reveals that, although courts have employed all three approaches, the vast majority have utilized a variant of harmless-error analysis. The Article next explores the definition of "cause," with an emphasis on the question of what, if any, attorney conduct constitutes a reasonable and valid explanation for failure to abide by a state procedural rule. Examination of the cases reveals that the lower courts have divided sharply over what type of attorney conduct constitutes cause, but that courts generally define cause most expansively when a habeas petitioner suggests the possibility of an unjust incarceration.

Historical Overview

The circumstances under which the failure of a state prisoner to raise a federal constitutional claim in accordance with state procedures will foreclose federal habeas review are different today than they were in 1963 and were different in 1963 than they had been ten years earlier. A brief overview of this changing Supreme Court jurisprudence and the significant issues as yet unresolved provides a necessary backdrop to this Article.

From Brown to Francis

It was not until 1953 that the Supreme Court in *Brown v. Allen*[4] addressed the question of whether a state prisoner's noncompliance with a state procedural rule would foreclose access to federal habeas review. In *Brown* two state prisoners sought habeas review of constitutional claims that, although properly raised at trial, had been filed one day late on appeal. Neither the state supreme court, which enforced the filing deadline, nor the United States Supreme Court, which denied

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to bar him, under an applicable waiver standard, from having the constitutional claim considered on its merits by a federal court on collateral review.

[4] 344 U.S. 443 (1953).

a writ of certiorari, addressed the merits of these claims on direct appeal. Reviewing a subsequent request for a federal writ of habeas corpus, the Supreme Court held that the state prisoners' failure to comply with the state filing deadline prevented them from seeking collateral relief in federal court on their constitutional claims.[5] In reaching this result, the Court in *Brown* suggested that an adequate and independent state procedural ground precluding direct review in the Supreme Court also barred habeas review in federal district court.[6]

This suggestion was abandoned a decade later in *Fay v. Noia*,[7] a case involving a habeas petitioner who, although having raised constitutional claims at trial, failed to appeal his conviction. The Court in *Fay* ruled that "the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute."[8] The Court further stated, however, that if a state prisoner had "deliberately by-passed the orderly procedure of the state courts,"[9] a federal habeas court, as a matter of comity, retained "limited discretion" to hold that the prisoner had "forfeited," or waived, his right to federal habeas review. "Deliberate by-pass," the waiver standard enunciated in *Fay*, was defined narrowly as "an intentional relinquishment or abandonment of a known right or privilege."[10]

In 1973, the Supreme Court in *Davis v. United States*[11] began to cast doubt on the continuing vitality of the *Fay* waiver standard. *Davis* involved a federal prisoner who sought to vacate his sentence pursuant to 28 U.S.C. § 2255 by asserting a claim he had not previously raised, namely, that blacks had been excluded from the grand jury that had indicted him. The *Davis* Court opted not to apply *Fay* to determine whether the prisoner had waived his right to collateral review.[12]

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[5] *Id.* at 487.

[6] *Id.* at 485-86.

[7] 372 U.S. 391 (1963).

[8] *Id.* at 399.

[9] *Id.* at 438.

[10] *Id.* at 439 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The Court in *Fay* held that insofar as the state prisoner there involved had been confronted with the "grisly choice" of accepting a life sentence or taking an appeal which carried the risk of a death sentence, he had not "deliberately by-passed" state procedures by failing to take a direct appeal. *Id.* at 439-40.

[11] 411 U.S. 233 (1973).

[12] The Court distinguished Kaufman v. United States, 394 U.S. 217 (1969), in which the "deliberate by-pass" standard was applied to a federal prisoner who raised a fourth amendment claim at trial but not on appeal, on the ground that the *Kaufman* Court had no

Rather, the Court held that Rule 12 of the Federal Rules of Criminal Procedure, which bars litigation of claims not raised before trial based on defects in the institution of criminal proceedings, absent "cause shown" for failing to assert those claims, applied on collateral review as well as on direct appeal. To hold otherwise, the Court concluded, would be to "perversely negate" the legitimate federal interests underlying Rule 12, which the Court identified as, first, having such claims resolved before trial when a defect can easily be cured by obtaining a new indictment, and, second, discouraging lawyers from delaying the litigation of constitutional claims for tactical reasons.[13]

Three years later, the Court in *Francis v. Henderson*[14] applied the *Davis* rule in the case of a state prisoner had not complied with a state procedural rule requiring that claims of grand jury discrimination be raised before trial. "If, as *Davis* held, the federal courts must give effect to [the] important and legitimate concerns [underlying Rule 12] in § 2255 proceedings," the Court reasoned, "surely considerations of comity and federalism require that they give no less effect to the same clear interests when asked to overturn state criminal convictions."[15] Accordingly, although without explaining why the waiver standard in *Fay* was not controlling, the Court in *Francis* held that the state prisoner was foreclosed from federal habeas review, for he had failed to present "not only a showing of 'cause' for [his] failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice."[16]

This two-part waiver standard, under which a petitioner must show *both* cause *and* actual prejudice to overcome a procedural de-

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occasion to consider the effect of a failure to raise a fourth amendment claim at trial. 411 U.S. at 240 n. 7; see notes 41-48 & accompanying text *infra*.

[13] 411 U.S. at 241.

[14] 425 U.S. 536 (1976). On the same day *Francis* was decided, the Court in Estelle v. Williams, 425 U.S. 501, 512-13 (1976), held that although a state cannot compel an accused to stand trial before a jury while garbed in prison clothing, the failure of an accused to object to his being so tried, for whatever reason, was "sufficient to negate the presence of compulsion necessary to establish a constitutional violation." In a concurring opinion, Justice Powell, joined by Justice Stewart, characterized the failure of defense counsel to object at trial as an "inexcusable procedural default" that deprived the defendant of an otherwise valid constitutional claim. Relief from such a default, in Justice Powell's view, ought "not be carried to the length of allowing counsel for a defendant deliberately to forego objection to a curable trial defect, even though he is aware of the factual and legal basis for an objection, simply because he thought objection would be futile." *Id.* at 515 (Powell, J., concurring). See text accompanying notes 141-44 *infra*.

[15] 425 U.S. at 541.

[16] *Id.* at 542 (footnote omitted).

fault, was derived from *Shotwell Manufacturing Co. v. United States*,[17] the leading case interpreting the "cause shown" exception to Rule 12. The petitioners in *Shotwell* raised an untimely challenge to the selection of their grand and petit juries on the basis of what they termed "newly discovered" evidence. The Supreme Court, denying relief, found no "cause shown" under Rule 12 because the "facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial,"[18] and because the alleged jury irregularities did not prejudice the petitioners. "[I]t is entirely proper," the *Shotwell* Court indicated, "to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from [Rule 12]."[19] This admonition that the absence of prejudice may alter the showing necessary to establish "cause shown" under Rule 12 emerged later in *Davis* and *Francis* as the two-part cause-and-prejudice test governing the waiver of grand jury claims in the collateral review of both state and federal convictions.

Wainwright v. Sykes

During its next Term, the Court in *Wainwright v. Sykes*[20] extended its decision in *Francis* beyond grand jury claims. *Sykes* involved a state prisoner seeking federal habeas relief on the ground that he had not validly waived his *Miranda* rights with regard to several inculpatory statements introduced at trial. His trial counsel, however, had not raised the *Miranda* claim at or before trial as mandated by a state contemporaneous-objection rule. The district court granted habeas relief.

On appeal, the Court of Appeals for the Fifth Circuit focused on whether the state prisoner had forfeited his right to federal habeas review by failing to comply with the contemporaneous-objection rule. Reasoning that prejudice was inherent in a case involving the admissibility of an incriminating statement, the appellate court distinguished *Davis v. United States* as a case involving a nonprejudicial claim and turned instead to *Fay v. Noia* for the applicable waiver standard. The *Davis* court concluded that the prisoner's failure to object was not a trial tactic and thus not a deliberate by-pass.[21]

The Supreme Court reversed and held that the prisoner's failure to comply with the state contemporaneous-objection rule in raising his *Miranda* claim was governed not by the deliberate by-pass waiver standard in *Fay*, but rather by the *Davis* and *Francis* cause-and-actual-prejudice standard. This holding reflected the Court's fear that *Fay*'s "deliberate by-pass" test might "encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off."[22] Moreover, the Court expressed the view that the state contemporaneous-objection rule at issue in *Sykes* "deserves greater respect than *Fay* gives it, both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right."[23] Those interests were identified as enhancing the finality of criminal judgments by forcing the litigation of constitutional issues at the trial court level, and promoting judicial efficiency by enabling the trial court in a single and timely proceeding to develop the factual record underlying a constitutional claim. Accordingly, the Court, although not overruling the *Fay* holding that an adequate and independent state procedural ground does not deprive a federal court of the power to entertain a habeas petition, rejected as dictum the suggestion in *Fay* that the deliberate by-pass test was an "all-inclusive" waiver standard applicable whenever a state prisoner had committed a procedural default.[24]

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[17] 371 U.S. 341 (1963).

[18] *Id.* at 362-63.

[19] *Id.* at 363.

[20] 433 U.S. 72 (1977).

[21] 528 F.2d 522, 526-27 (5th Cir. 1976).

The Court in *Sykes* left "open for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard."[25] Apart from its observation that the standard was narrower than the deliberate by-pass test, the Court noted only that:

> Whatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here. Respondent has advanced no explanation whatever for his failure to object at trial, and, as the proceeding unfolded, the trial judge is certainly not to be faulted for failing to question the admission of the confession himself. The other evidence of guilt presented at trial, moreover, was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement.[26]

This test, it added, would "not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice."[27] The Court concluded that the state prisoner, having demonstrated neither cause nor actual prejudice, had forfeited his right to federal collateral review.

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[22] 433 U.S. at 89.

[23] *Id.* at 88.

[24] The precise extent to which *Sykes* restricted the applicability of the *Fay* waiver standard is somewhat uncertain. See notes 28-35 & accompanying text *infra*.

[25] 433 U.S. at 87.

[26] *Id.* at 91 (footnote omitted).

The Unresolved Issues

Four major issues remain unresolved in the aftermath of *Sykes*. First, the Court left uncertain the extent to which the cause-and-prejudice test had displaced the deliberate by-pass test. The Court, without explicitly overruling *Fay*, rejected as "going far beyond the facts of [that] case," the "sweeping language" of *Fay* suggesting that the deliberate by-pass test applied to all habeas cases involving a procedural default.[28] The *Sykes* Court, impliedly criticizing the *Fay* Court for having strayed far from the facts before it,[29] concluded that "[w]e do not chose to paint with a similarly broad brush here."[30] It is clear, therefore, that the waiver standard in *Fay* has been substantially overruled, but whether its continued vitality is at present restricted only to the facts in *Fay* remains uncertain.[31]

The lower federal courts, in response to this uncertainty, have looked to *Sykes* for guidance in determining whether to apply the deliberate by-pass test or the cause-and-prejudice test in specific factual contexts. Such guidance has been found not in the majority opinion in *Sykes* but rather in Chief Justice Burger's concurring opinion. Chief Justice Burger argued that "the 'deliberate bypass' standard . . . was never designed for, and is inapplicable to, errors—even of constitutional dimension—alleged to have been committed during trial."[32] Requiring a knowing and intelligent waiver by the defendant was appropriate, he conceded, in the context of procedural decisions entrusted to the defendant himself, such as the decision to take an appeal or to request the representation of counsel. Requiring such a waiver, however, was particularly inappropriate in the context of trial decisions normally committed to counsel, for "[t]he trial process simply does not permit the type of frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as a trial proceeds."[33] This distinction, also endorsed by Justice Stevens in his concurring opinion in *Sykes*,[34] has prevailed in the lower federal courts. The majority view to date is that *Fay* governs decisions "of the sort entrusted to the defendant himself," whereas *Sykes* governs decisions "of the kind normally committed to counsel."[35]

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[27] *Id.*

[28] *Id.* at 87-88.

[29] The court even reserved for future resolution the question whether *Fay* still governed the facts of that case, namely, when a criminal defendant has waived all state rights to direct review of constitutional claims by failing to appeal a conviction. *Id.* at 88 n.12.

[30] *Id.*

[31] *See*, Rinehart v. Brewer, 561 F.2d 126, 130 n.6 (8th Cir. 1977).

[32] 433 U.S. at 91-92 (Burger, C.J., concurring).

A second issue confronting the lower federal courts is whether the Court in *Sykes* intended that a federal habeas court, as a condition precedent to applying the cause-and-prejudice test, must find that the failure of a habeas petitioner to raise his claim in accordance with state procedures is an adequate and independent state ground that would preclude direct review in the Supreme Court.[36] This issue arises because of the way in which the *Sykes* opinion is structured. After dividing the law of federal habeas corpus into four areas, the *Sykes* court identified the relevant inquiry in the case before it to be determining: "[i]n what instances . . . an adequate and independent state ground [will] bar consideration of otherwise cognizable federal issues on federal habeas review."[37] Upon concluding that the state contemporaneous-objection rule there at issue was adequate and independent, the Court then held that the cause-and-prejudice test should be applied to determine whether, as a matter of federal law, the habeas petitioner had waived his right to federal habeas review.[38] The *Sykes* Court may thus have indicated that the adequacy and independence of a state ground must form a preliminary inquiry in each *Sykes* case.[39]

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[33] *Id.* at 93 (Burger, C.J., concurring).

[34] *Id.* at 94-95 & 95 n.2 (Stevens, J., concurring).

[35] Frazier v. Czarnetsky, 439 F. Supp. 735, 737 (S.D.N.Y. 1977); *accord*, Rinehart v. Brewer, 561 F.2d 126, 130 n.6 (8th Cir. 1977). Courts have applied this distinction between decisions committed to counsel and those reserved for the defendant in cases involving not only the waiver of claims at trial, but also the waiver of claims on appeal. The prevailing rule is that *Fay* governs the decision whether to appeal at all, whereas *Sykes* governs the decision whether to appeal a particular claim. *See, e.g.*, Boyer v. Patton, 579 F.2d 284, 286 (3d Cir. 1978); Evans v. Maggio, 557 F.2d 430, 433-34 (5th Cir. 1977); Ennis v. LeFevre, 560 F.2d 1072, 1075-76 (2d Cir. 1977) (Meskill, J.) (nonplurality opinion); United States *ex rel.* Carbone v. Manson, 447 F. Supp. 611, 619 & n.4 (D. Conn. 1978); Ramsey v. United States, 448 F. Supp. 1264, 1273-74 & 1273 n.18 (N.D. Ill. 1978). *But see* Buckelew v. United States, 575 F.2d 515, 518-19 & 519 n.3 (5th Cir. 1978); Ennis v. LeFevre, 560 F.2d 1072, 1077 (2d Cir. 1977) (Gurfein, J., concurring).

By way of example, the court in Frazier v. Czarnetsky, 439 F. Supp. 735, 737 n.4 (S.D.N.Y. 1977), listed as decisions of the sort normally entrusted to the defendant himself the decision whether to plead guilty, whether to forego assistance of counsel, and whether to refrain from taking an appeal. Such decisions were, in the court's view, still governed by the deliberate by-pass test.

[36] If the adequate and independent state ground doctrine does not form an independent inquiry, then it may be subsumed as part of the "cause" test. In other words, a habeas petitioner could show cause for failure to abide by a state rule if the rule itself would not preclude direct review of the constitutional claims in the Supreme Court. Use of the doctrine as a definition of cause would, however, mandate that a prisoner show actual prejudice in addition to the presence of an inadequate state ground. Such a result would be more restrictive than either the application of the doctrine on direct review or the application of Stone v. Powell, 428 U.S. 465, 494 (1976), which allows a federal court to hear the merits of a fourth amendment claim if the habeas petitioner did not have a "full and fair opportunity" to present his claim in state court. See text accompanying notes 54-60 *infra*. The "full and fair opportunity" test has not been read to incorporate any form of actual prejudice. *See, e.g.*, Note, *Circuits Split over Application of Stone v. Powell's "Opportunity for Full and Fair Litigation,"* 39 VAND. L. REV. 881 (1977).

Requiring such an inquiry would have two practical consequences. First, the adequate and independent state ground doctrine, a body of law that long has been within the Supreme Court's exclusive domain, would be applied routinely by the lower federal courts in each procedural default case. Second, and more importantly, a federal habeas court, by finding that a state ground is not adequate or independent, could avoid the cause-and-prejudice inquiry altogether and proceed directly to the merits of a habeas petitioner's claim. Already some lower federal courts have avoided application of the *Sykes* test by explicitly invoking, or relying on lines of analysis appropriate to, the adequate and independent state ground doctrine.[40]

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[37] 433 U.S. at 78-79.

[38] *Id.* at 86-87. *Sykes* did not overrule *Fay*'s holding that an adequate and independent state ground does not bar federal habeas review; instead the Court simply revised the federal waiver standard. *Id.* at 87-88, 100-01 n.2 (Brennan, J., dissenting).

[39] There can be no dispute that even if *Sykes* does not mandate an inquiry into the adequacy and independence of a state ground, a federal habeas court, before applying the cause-and-prejudice test, must determine whether the habeas petitioner in fact violated a state procedural rule in raising his claim. The waiver standard in *Sykes* is not applicable where the habeas petitioner was not required under state procedures to raise his federal constitutional claim in a particular manner or at a particular time during the state court proceeding, *see, e.g.*, Rummel v. Estelle, 587 F.2d 651, 653-54 (5th Cir. 1978) (en banc) (defendant not required under Texas law to challenge at trial the constitutionality of the statute under which he is convicted); where the petitioner has not violated a state procedural rule because his case falls within an exception to that rule, *see, e.g.*, Miller v. North Carolina, 583 F.2d 701, 705 (4th Cir. 1978) (defendant, contrary to general rule, not required under North Carolina law to object at trial to prosecutor's closing statement where "argument of counsel in a capital case is so grossly improper that removal of its prejudicial effect, after a curative instruction, remains in doubt"); Cole v. Stevenson, 447 F. Supp. 1268, 1272 (E.D.N.C. 1978) (defendant, contrary to general rule, not required to object at trial to jury instructions containing presumptively prejudicial errors of law); or where the habeas petitioner has in fact complied with the state procedure in question, *see* Thomas v. Estelle, 582 F.2d 939, 940-41 (5th Cir. 1978); Henne v. Fike, 563 F.2d 809, 811 (7th Cir. 1977) (per curiam).

[40] A line of adequate and independent state ground cases that refuses to countenance the application of a state rule in a manner violative of due process has been invoked by some

The lower federal courts have focused on yet a third question: whether the cause-and-prejudice test governs cases involving federal prisoners seeking to vacate their convictions, pursuant to 28 U.S.C.

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federal courts confronted with a *Sykes* situation. *Compare* White v. Estelle, 566 F.2d 500, 504 (5th Cir. 1978) (state trial court's denial of a motion for continuance not made in conformance with a state procedural rule amounted to "manifest injustice") *and* United States v. McCloud, No. 78-C-1424 (E.D.N.Y. Dec. 4, 1978) (it "would shock the conscience" to bar a youthful offender from seeking habeas corpus relief from unconstitutional sentencing because he did not comply with a state rule that the challenge be raised at trial) *with* Reece v. Georgia, 350 U.S. 85, 89-90 (1955) (federal claim should have been considered by state supreme court on the merits where defendant was not given a constitutionally adequate opportunity to raise the claim). Other adequate state ground cases, which support the proposition that a state court's decision not to exercise its discretion to hear a federal claim will not constitute an adequate state ground, have been similarly invoked. *Compare* Taylor v. Reid, No. 78 Civ. 862 (S.D.N.Y. Dec. 1, 1978) (Because under state law "a failure to object does not necessarily foreclose an attack based upon an alleged constitutional infirmity . . . petitioner's claim is not foreclosed by failure to object at trial.") *with* Williams v. Georgia, 349 U.S. 375, 389 (1955) (Supreme Court has jurisdiction to consider federal claim where state supreme court declines to grant motion for a new trial "though possessed of power to do so under state law."); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 233-34 (1969) (Supreme Court reaches a federal claim where a state court, exercising its discretion, refused to hear the claim despite the arguable violation of a state procedural rule); Henry v. Mississippi, 379 U.S. 443, 449 n.5 (1965), *and id.* at 454-57 (Black, J., dissenting).

The adequate state ground case of Henry v. Mississippi, 379 U.S. 443, 447-48 (1965), which suggests that application of a state procedural rule might be inadequate "unless the State's insistence on compliance . . . serves a legitimate state interest," offers another avenue for federal courts to avoid application of the *Sykes* test. *See* St. John v. Estelle, 563 F.2d 168, 177-78 (5th Cir. 1977) (en banc) (per curiam) (Tjoflat, J., dissenting) (motion for mistrial made eight questions after damaging testimony adequately served state's interest in demanding contemporaneous objection to witness' testimony); Holmes v. Israel, 453 F. Supp. 864, 867 (E.D. Wis. 1978) (*Sykes* may be inapplicable where counsel failed to make specific objection to evidence as required by state rule but did make general objection and moved for mistrial). The continued viability of *Henry* has been questioned, however. *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and The Federal System 558-62 (2d ed. 1973); Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 Colum. L. Rev. 1050, 1052 (1978). *See also* Monger v. Florida, 405 U.S. 958 (1972) (Supreme Court upholds as adequate a state court's dismissal of an appeal because, contrary to state procedure, it had been filed after oral judgment but before the written judgment was handed down). Nevertheless, the *Sykes* Court cited *Henry* in support of its conclusion that the Florida contemporaneous-objection rule constituted an adequate and independent state ground. 433 U.S. at 87.

In addition to the formulations of the adequate state ground rule noted above, the Supreme Court has held state grounds to be inadequate where the state ground could not have been foreseen, NAACP v. Alabama, 357 U.S. 449, 457-58 (1958), if its application amounted to an "arid ritual of meaningless form," Staub v. City of Baxley, 355 U.S. 313, 320 (1958), or if the application of the state rule appeared to have been arbitrary or designed to frustrate federal constitutional rights, Rogers v. Alabama, 192 U.S. 226, 230-31 (1904). *See also* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *supra*, at 526-62; L. Tribe, American Constitutional Law 120-29 (1978); C. Wright, A. Miller, B. Cooper & E. Gressman, Federal Practice and Procedure: Jurisdiction and Related Matters §§ 4025-28 (1977); Hill, *The Inadequate State Ground*, 65 Colum. L. Rev. 943 (1965).

§ 2255, on grounds not raised in accordance with applicable federal procedures. In *Davis v. United States*,[41] the Court confronted the case of a federal prisoner seeking section 2255 relief on a claim of grand jury discrimination not raised before trial as required by Rule 12 of the Federal Rules of Criminal Procedure. The Court, in order not to undermine the important federal interests underlying Rule 12, held that the "cause shown" exception to Rule 12 applied with equal force on direct and collateral review. The rationale of *Davis*, therefore, strongly suggests that in section 2255 proceedings the cause-and-prejudice test applies not only to grand jury claims, but rather to all claims governed by Rule 12.[42] A more difficult question is whether, in light of the strong language in *Sykes* emphasizing the important interests underlying procedural rules requiring timely objections to asserted errors,[43] *Sykes* mandates that the cause-and-prejudice test apply not just to claims governed by Rule 12, but rather to all claims not raised in accordance with applicable federal procedures. To date, the lower federal courts have read *Sykes* expansively, applying the cause-and-prejudice test in section 2255 proceedings involving a variety of non-Rule 12 claims.[44] Thus, the lower federal courts have faced three major issues relating to the applicability of the *Sykes* cause-and-actual-prejudice standard for collateral review.

The resolution of the three preceeding issues would, however, be far from a complete settlement of the unresolved questions after *Sykes*. The fourth issue confronting the lower federal courts, and the issue to which this Article is addressed, is the meaning of the terms "cause" and "actual prejudice," the two prongs of the *Sykes* waiver standard. The Article turns first to the definition of "actual prejudice," for, as explained below, the factors relevant to defining "actual prejudice" may also have a bearing on the definition of "cause."

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[41] 411 U.S. 233 (1977). For a discussion of *Davis*, see text accompanying notes 11-13 *supra*.

[42] *See* United States v. Underwood, 440 F. Supp. 499, 501-02 (D.R.I. 1977) (*Davis* rule applied in a § 2255 proceeding to a fourth amendment claim that the federal prisoner had not raised before trial as required by Rule 12).

[43] 433 U.S. at 88-90.

[44] *See* Buckelew v. United States, 575 F.2d 515, 519-20 (5th Cir. 1978) (failure to raise on direct appeal, pursuant to Federal Rule of Appellate Procedure 10(e), the claim that the trial transcript was incomplete because of the alleged suppression of judicial misconduct); Sincox v. United States, 571 F.2d 876, 879 (5th Cir. 1978) (failure to raise at trial or on direct appeal claim that petitioner had been denied right to a unanimous verdict); Brawer v. United States, 462 F. Supp. 739 (S.D.N.Y. 1978) (failure to object at trial to impeachment on the basis of prior uncounseled convictions); *cf.* Fanow v. United States, 580 F.2d 1339, 1356-57 (9th Cir. 1978) (assuming, without deciding, that *Sykes* governs the waiver of a claim, not raised either at time of sentence as required by Federal Rule of Criminal Procedure 32(a)(1) or on direct appeal, that petitioner's sentence was improperly enhanced on the basis of prior uncounseled convictions).

Actual Prejudice

One prong of the *Sykes* waiver standard requires a habeas petitioner seeking to overcome a procedural default to make some showing of actual prejudice resulting from the constitutional violation he has alleged.[45] This section examines three sources of authority suggesting possible definitions of actual prejudice and then explores the Supreme Court and lower court interpretations of the term.

Sources of Authority to Define "Actual Prejudice"

One source of authority to define actual prejudice is the view, advocated by Justice Black and Judge Friendly, that the availability of collateral review under habeas corpus and section 2255 should depend on a petitioner's ability to make a colorable showing that he did not in fact commit the crime for which he was convicted. The assumption underlying this view was first voiced by Justice Black in his dissenting opinion in *Kaufman v. United States*.[46] In *Kaufman* where the Court permitted a federal prisoner to obtain collateral relief under section 2255 for a search and seizure claim he had not raised on direct review,[47] Justice Black argued that not every conviction involving a constitutional error should be subject to collateral review. He singled out the petitioner's "probable or possible innocence" as an important factor that should govern the availability of collateral relief, noting that "few would think that justice requires release of a person whose allegations clearly show that he was guilty of the crime of which he had been convicted."[48]

Following Justice Black's dissent in *Kaufman*, Judge Friendly, in an influential article,[49] advanced the thesis "that, with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence."[50] Arguing that collateral review runs counter to important values underlying the criminal system, Judge Friendly took issue with the maxim that " '[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.' "[51] He agreed "that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation," but disagreed "that they should have *none*."[52] Balancing the state interest in the finality of criminal judgments against the defendant's interest in vindicating his innocence, Judge Friendly argued that although any defendant should have the opportunity on direct review to litigate constitutional claims, only a defendant with "a colorable claim of innocence" should have that opportunity on collateral review.

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[45] Wainwright v. Sykes, 433 U.S. 72, 84, 91 (1977).

[46] 394 U.S. 217, 232-42 (1969) (Black, J., dissenting).

[47] Finding no "deliberate by-pass" of the direct appeal, the Court held that, under the then applicable *Fay* standard, the prisoner had not waived his right to collateral review. *Id.* at 220 n.3.

[48] *Id.* at 233.

[49] Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970).

[50] *Id.* at 142.

In clarifying what he meant by "a colorable claim of innocence," Judge Friendly emphasized that he did not mean a showing that the petitioner, but for the alleged constitutional error, might not or would not have been convicted. Instead, he defined his threshhold criterion as requiring a petitioner for collateral relief to show "a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have become wrongly excluded or to have become available only after the trial, the trier of facts would have entertained a reasonable doubt of his guilt."[53] This would mean that, under the *Sykes* standard, a petitioner suffers "actual prejudice" from a constitutional claim only when he can make a colorable showing of factual innocence.

Such an interpretation of actual prejudice embodies the assumption, endorsed by both Justice Black and Judge Friendly, that the proper role of collateral review is not to remedy every unconstitutional conviction, but rather to remedy every unconstitutional conviction of an innocent person. A guilty prisoner, so the argument goes, suffers no actual prejudice from the procedural foreclosure of his constitutional claims. The crucial inquiry under this interpretation of actual prejudice is, once again, whether the petitioner can demonstrate, based on all available evidence (legal and illegal, admitted and not admitted) the existence of a reasonable doubt as to his guilt.

A second source of authority for defining "actual prejudice" is the view apparently underlying Justice Powell's majority opinion in *Stone v. Powell*[54]—that the primary purpose of habeas corpus is to ensure that a petitioner has been accorded those constitutional guarantees bearing on the reliability of the guilt-determining process. In *Stone*, the Court held that where a state petitioner has had a full and fair opportunity to litigate his fourth amendment claims on direct review, the petitioner may not invoke habeas corpus to litigate those claims in federal court.

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[51] *Id.* at 149 (quoting Sanders v. United States, 373 U.S. 1, 8 (1963)).

[52] *Id.* at 150 (emphasis in original).

[53] *Id.* at 160.

[54] 428 U.S. 465 (1976).

A concise statement of the *Stone* Court's view of the appropriate role of habeas corpus appears in a footnote of the majority opinion, where, after listing those societal values undermined by habeas corpus, it concluded:

> We nevertheless afford broad habeas corpus relief, recognizing the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty. . . . But in the case of a typical Fourth Amendment claim, asserted on collateral attack, a convicted defendant is usually asking society to redetermine an issue that has no bearing on the basic justice of his incarceration.[55]

In the first quoted sentence, the Court seems to suggest that the role of habeas corpus is to remedy all constitutional errors in cases where the petitioner was convicted of a crime that he did not in fact commit. This would create a system of habeas review akin to the Black-Friendly approach. The second sentence as well as the actual holding in *Stone*, however, focus not upon the guilt or innocence of the petitioner, but rather upon the type of claim asserted.[56] The thrust of *Stone* is to provide collateral relief only for the violation of those constitutional rights "bearing on the basic justice of [a convicted defendant's] incarceration."

A constitutional right "bearing on the basic justice of [a convicted defendant's] incarceration" is one that increases the accuracy of the trier of fact's determination that an individual committed the crime for which he was convicted (hereafter referred to as a "truth-furthering" right).[57] The classic example of a truth-furthering right is the sixth amendment right to effective assistance of counsel. A criminal defendant, in the Supreme Court's view, "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[58] Effective assistance of counsel thus reduces the likelihood of an erroneous conviction. In contrast, fourth amendment claims are non-truth-furthering because illegally seized evidence is "typically reliable and often the most probative information bearing on the guilt or innocence of the defendant."[59] Exclusion of such evidence, therefore, often bears a negative correlation to the reliability of the truth-determining process.

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[55] *Id.* at 491 n.31.

[56] In assessing the availability of habeas corpus in cases where the habeas petitioner has had a full and fair opportunity to litigate his claims on direct review, Justice Powell consistently has focused upon the nature of the petitioner's claim rather than upon the petitioner's actual guilt or innocence. *See* Brewer v. Williams, 430 U.S. 387, 414 (1977) (Powell, J., concurring) (*Massiah* violation); Castaneda v. Partida, 430 U.S. 482, 508 n.1 (1977) (Powell, J., dissenting) (grand jury discrimination); Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) (search and seizure claim); Schneckloth v. Bustamonte, 412 U.S. 218, 266 (1973) (Powell, J., concurring) (search and seizure claim).

[57] *See* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1092 (1977) ("Truth-furthering rights are rights that foster sound guilt/innocence determinations with the requisite degree of certainty.")

Applying *Stone* to all non-truth-furthering rights would yield a system of collateral review designed primarily to ensure that every habeas petitioner has been accorded those constitutional rights bearing on the reliability of the guilt-determining process.[60] Those claims cognizable under *Stone* guarantee, in effect, a minimum degree of fact-finding accuracy in the criminal process. The model of habeas corpus contemplated by *Stone* suggests an interpretation of the "actual prejudice" standard focusing on whether the claim that the habeas petitioner failed to raise properly involves a truth-furthering right. If so, the petitioner would satisfy the actual prejudice test; if not, the petitioner would have lost his right to collateral review.

A third source of authority for defining actual prejudice is the harmless-error rule,[61] which measures the prejudicial effect of a trial court error. The doctrine of harmless error, which assumes that some trial errors simply are too insignificant to warrant reversal of the trier of fact's judgment, is invoked by appellate courts to determine whether a litigant asserting an error is entitled to a new trial.

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[58] Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

[59] Stone v. Powell, 428 U.S. 465, 490 (1976).

[60] The Supreme Court has not yet applied *Stone v. Powell* to claims other than the fourth amendment, although it is currently considering a case which offers the opportunity to extend *Stone* to the claim that the foreman of a grand jury was chosen in a racially discriminatory manner. *See* Mitchell v. Rose, 570 F.2d 129 (6th Cir. 1977), *cert. granted*, 47 U.S.L.W. 3221 (U.S. Oct. 2, 1978). Justice Powell has raised the issue of *Stone*'s applicability to the claim of an unconstitutionally constituted grand jury, *see* Castaneda v. Partida, 430 U.S. 482, 508 n.1 (1977) (Powell, J., dissenting), as well as to fifth and sixth amendment claims, *see* Brewer v. Williams, 430 U.S. 387, 414 (1977) (Powell, J., concurring).

[61] *See generally* R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR (1970); Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15 (1976) [hereinafter cited as Field]; Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973) [hereinafter cited as Saltzburg].

The Supreme Court, prior to its decision in *Chapman v. California*,[62] seemed to follow a per se rule requiring the automatic reversal of a defendant's conviction in criminal cases involving constitutional errors.[63] Though retaining the per se rule for a limited number of trial errors,[64] the Court in *Chapman* adopted a more flexible standard: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[65] Put another way, the *Chapman* standard mandates a reversal where it is "reasonably possible" that the trial court's error influenced the verdict of the trier of fact.[66] The *Chapman* Court further held that the beneficiary of a constitutional error, rather than the defendant, has the burden of proof in a harmless error case.[67]

In applying the *Chapman* standard in subsequent cases, the Court has taken two approaches to evaluating a harmless error.[68] Under the first approach, the Court asks whether, upon excluding the evidence tainted by constitutional error, the jury's verdict is still supported by "overwhelming evidence." This approach is illustrated by *Milton v. Wainwright*,[69] where the Court invoked the harmless-error rule to dismiss a habeas petition challenging on constitutional grounds the introduction at trial of a postindictment confession that was obtained by a police officer posing as an accused person confined with the petitioner. In denying relief without reaching the merits, the Court noted that

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[62] 386 U.S. 18 (1967).

[63] *See* Saltzburg, *supra* note 61, at 999-1002.

[64] In his majority opinion in *Chapman*, Justice Black noted that "our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. at 23. To support this proposition, he cited three examples: Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession); Tumey v. Ohio, 273 U.S. 510 (1927) (impartial judge). 386 U.S. at 23 n.8.

[65] 386 U.S. at 24. The *Chapman* harmless error standard conforms with the due process requirement, enunciated in *In re* Winship, 397 U.S. 358 (1970), that the state prove beyond a reasonable doubt each element of a criminal offense. That is, insofar as the trier of fact must find beyond a reasonable doubt that a defendant is guilty of a criminal charge, an appellate court, in finding harmless error, should be no less certain that a trial court error did not affect the verdict. The appellate court, under a less stringent harmless error standard, would be able to uphold a conviction that, given the error of the trial court, no longer satisfied the standard of beyond a reasonable doubt. Thus, *Chapman* ensures that *In re Winship* is not undermined on appellate review. *See* Saltzburg, *supra* note 61, at 1014-15 n.89.

[66] Saltzburg, *supra* note 61, at 1014 & n.88.

[67] 386 U.S. at 24.

[68] *See* Field, *supra* note 61, at 16-36; Saltzburg, *supra* note 61, at 1014-15 n.89. One commentator has suggested that the Court may be developing a third approach to harmless error. See note 74 *infra*.

[69] 407 U.S. 371 (1972).

"[t]he jury, in addition to hearing the challenged testimony, was presented with overwhelming evidence of petitioner's guilt, including no less than three full confessions" that were constitutionally admissable.[70] Thus, the Court focused not upon the prejudicial effect of the tainted evidence, but rather upon the sufficiency of the untainted evidence.

Under the second approach to harmless error, the Court inquires whether there is a "reasonable possibility" that the tainted evidence influenced the verdict of the jury. In *Chapman*, the Court held that a prosecutor's comment upon the defendants' failure to testify in their own behalf and a trial judge's instruction to the jury that it could draw adverse inferences from such failure did not constitute harmless error.[71] The Court reached its conclusion by resolving "whether there [was] a reasonable possibility that the evidence complained of might have contributed to the conviction,"[72] rather than focusing, as the lower court had done, on whether the jury was presented with overwhelming evidence of the defendants' guilt.[73]

The obvious contrast between the two approaches to harmless error is that the former, as illustrated by *Milton*, focuses on the sufficiency of the untainted evidence, whereas the latter, as illustrated by *Chapman*, focuses on the possible prejudicial effect of the tainted evidence.[74] As one commentator persuasively has argued, however,[75] these two approaches will yield similar results under the "beyond a reasonable doubt" standard in *Chapman.*[76] If the *Chapman* standard is met under the first approach (*i.e.*, the untainted evidence of guilt is overwhelming beyond a reasonable doubt), "it is hard to believe," so the commentator observed, "that the . . . test [for the second approach] would not also be met, *i.e.*, that anyone could believe that the error contributed to the verdict, or that its contribution was significant enough to warrant reversal."[77]

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[70] *Id.* at 372.

[71] 386 U.S. at 26.

[72] *Id.* at 23 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)).

[73] *Id.* at 23-24. The Court, however, did not focus entirely upon the tainted evidence. *See, e.g., id.* at 25-26 ("[T]hough the case in which this occurred presented a reasonably strong 'circumstantial web of evidence' against petitioners, . . . it was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts.") (citation omitted).

[74] The cases do not reveal whether the Court clearly prefers one approach over the other. In addition to the conflict between *Chapman* and *Milton*, the Court in Harrington v. California, 395 U.S. 250, 254 (1969), apparently applied the "overwhelming evidence" test while claiming to reaffirm *Chapman*. This peculiar result has lead one commentator to conclude that *Harrington* may herald a third approach to harmless error "that focuses on whether the tainted evidence was 'merely cumulative'—that is, whether untainted evidence that says the same thing as the excluded evidence remains in the case." Field, *supra* note 61, at 37.

[75] Saltzburg, *supra* note 61, at 1014-15 n.89.

[76] See note 65 *supra*.

For the purposes of this Article, however, it is less important to distinguish between the approaches to harmless error than it is to distinguish between harmless error and the other sources of authority that may be used to define "actual prejudice." Both approaches to the harmless error standard differ markedly from the "colorable showing of innocence" standard for actual prejudice. The "overwhelming evidence" approach varies from the "colorable showing of innocence" requirement in that the former examines only the sufficiency of untainted evidence introduced at trial, whereas the latter examines the sufficiency of all evidence—tainted or untainted, admitted or not admitted. That is, the former focuses on legal guilt based on the admissible portion of the trial record, while the latter focuses on factual guilt based on all the available evidence. The "reasonable possibility" approach differs from the "colorable showing of innocence" requirement because the former examines only the effect of tainted evidence, whereas the latter examines all available evidence. The "reasonable possibility" approach focuses exclusively on the effect of the constitutional error on the determination of legal guilt, while the "colorable showing of innocence" requirement examines factual guilt.

These distinctions are best illustrated in the context of a meritorious fourth amendment or *Miranda* claim that evidence admitted at trial should have been suppressed. Such claims often involve evidence that is both reliable and highly probative of guilt. Accordingly, a habeas court applying harmless-error analysis is apt to conclude either that it is reasonably possible that the tainted evidence contributed to the verdict or that exclusion of the tainted evidence leaves less than overwhelming evidence to support the verdict. Under the "colorable showing of innocence" test, a habeas court, now focusing on the entire record, is apt to conclude that the petitioner's factual guilt remains beyond dispute.

Harmless error also differs from the "truth-furthering right" requirement of *Stone v. Powell*.[78] Both the "overwhelming evidence" and the "reasonable possibility" approaches measure the effect of a specific constitutional error in a particular factual setting. The classification of rights as "truth-furthering," however, distinguishes claims on the basis of the probable impact of the constitutional error on the accuracy of the guilt-determining process. Thus, a fourth amendment claim, which is a classic non-truth-furthering right, and hence insufficient to support a petition for collateral review under this test, may be prejudicial under harmless-error analysis if, for example, there is a reasonable possibility that introduction of illegally seized evidence may have influenced the jury's verdict.

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[77] Saltzburg, *supra* note 61, at 1014-15 n.89.

[78] See notes 54-60 & accompanying text *supra*.

In sum, the case law and commentary on habeas corpus suggest three possible interpretations of the actual prejudice standard. First, actual prejudice may refer to the possible factual innocence of the habeas petitioner—that is, whether the petitioner, based on all the available evidence, can make a colorable claim that he did not, in fact, commit the crime for which he was convicted. Second, the term may refer to whether the constitutional right allegedly violated bears a positive correlation to the reliability of the guilt-determining process. Third, actual prejudice may refer to whether the procedural foreclosure of the petitioner's claim is harmless error.

Judicial Interpretations of "Actual Prejudice"

Although reserving for future cases the precise definition of "actual prejudice,"[79] the Supreme Court in *Wainwright v. Sykes* applied the term to the facts before it in a manner similar to, yet a variant of, the harmless-error doctrine. The similarity emerges in the passage where the Court, concluding that the state prisoner had not demonstrated prejudice arising from his *Miranda* claim, noted that "[t]he other evidence of guilt presented at trial . . . was substantial to a degree that would negate any possibility of actual prejudice resulting to the [prisoner] from the admission of his inculpatory statement."[80] The variation lies in the fact that the Court required the petitioner to bear the burden of demonstrating the harm of the constitutional error,[81] rather than the government.[82] Thus, the Court in *Sykes* apparently concluded that, absent a showing that it was reasonably possible that the asserted error influenced the verdict of the trier of fact, the state prisoner had not made the requisite demonstration of actual prejudice to overcome his procedural default.[83]

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[79] 433 U.S. at 87.

[80] *Id.* at 91. See text accompanying notes 26-27 *supra*.

[81] 433 U.S. at 84. This point did not escape the attention of Justice White who commented in his concurring *Sykes* opinion that he felt that the harmless error rule itself adequately protected the state's interests: "As long as there is acceptable cause for the defendant's not objecting to the evidence, there should not be shifted to him the burden of proving specific prejudice to the satisfaction of the habeas corpus judge." *Id.* at 98 (White, J., concurring).

Shifting the burden to the petitioner has resulted in the dismissal of many habeas petitions for want of any showing of actual prejudice. *See, e.g.*, Spinkellink v. Wainwright, 578 F.2d 582, 620 (5th Cir. 1978); Frazier v. Czarnetsky, 439 F. Supp. 735, 738 (S.D.N.Y. 1977).

The vast majority of lower court decisions applying the actual prejudice standard have followed the approach suggested in *Sykes*.[84] The "overwhelming evidence" approach to analyzing harmless error appears, for example, in *Thomas v. Estelle*,[85] where a panel of the Court of Appeals for the Fifth Circuit concluded that a habeas petitioner had not demonstrated actual prejudice. The petitioner in *Thomas* was a state prisoner who upon his conviction for felony theft was given an enhanced sentence of life imprisonment pursuant to a state habitual offender statute. During the guilt phase of petitioner's bifurcated trial on the theft charge, the prosecutor read to the jury the indictment against petitioner which referred not only to the theft charge, but also to the habitual offender statute and to two earlier felony convictions. Petitioner's counsel failed to comply with a state contemporaneous-objection rule by neither objecting when the prosecutor read the indictment to the jury nor requesting an instruction limiting the jury's consideration of the prior conviction evidence to its determination at the punishment phase of the trial. On federal habeas review, petitioner successfully asserted in the district court that he had been denied a fair trial and was granted relief.

The Fifth Circuit in *Thomas* reversed the district court, holding that petitioner was barred under *Sykes* from seeking collateral review in federal court. Finding that petitioner had not made the requisite showing of actual prejudice, the court of appeals noted:

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[82] See text accompanying note 67 *supra*.

[83] Two members of the Court in *Sykes* observed that the majority had read a harmless-error standard into the definition of actual prejudice. Though suggesting in passing that *Stone v. Powell* might inform the meaning of actual prejudice, 433 U.S. at 110, Justice Brennan, in his dissenting opinion, concluded that "[t]he 'prejudice' inquiry . . . appears to bear a strong resemblance to harmless-error doctrine." *Id.* at 117. Reaching the same conclusion, Justice White chose to concur only in the judgment in *Sykes*, largely on the ground that the harmless-error rule applies by its own force in habeas cases. He reasoned: "It is thus of some moment to me that the Court makes its own assessment of the record and itself declares that the evidence of guilt in this case is sufficient to 'negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement'. . . . This appears to be tantamount to a finding of harmless error under the *Harrington* standard and is itself sufficient to foreclose the writ and to warrant reversal of the judgment." *Id.* at 97-98. *See also* Francis v. Henderson, 425 U.S. 536, 557 (1976) (Brennan, J., dissenting) (advocates a harmless error approach to defining "actual prejudice").

[84] *See, e.g.*, McDonald v. Estelle, 536 F.2d 667, 671-72 (5th Cir. 1976), *vacated*, 433 U.S. 904 (1977), *reaffirmed in relevant part*, 564 F.2d 199 (5th Cir. 1977); Ramsey v. United States, 448 F. Supp. 1264, 1273 (N.D. Ill. 1978); Bromwell v. Williams, 445 F. Supp. 106, 114, 120 (D. Md. 1977).

[85] 587 F.2d 695 (5th Cir. 1979).

> Actual prejudice, or its absence, must be determined by the facts and circumstances of each case. *See Wainwright v. Sykes* . . . . The danger inherent in the admission of prior convictions is that juries may convict a defendant because he is a "bad man" rather than because evidence of the crime of which he is charged has proved him guilty. . . . *No such prejudice is possible here. The evidence of petitioner's guilt is overwhelming.* A store employee saw petitioner take the money from the cash register. After being pursued from the store and apprehended by another employee, petitioner was heard to exclaim, "Let me go. You have got the money. Let me go." The stolen funds and checks were found under the car next to which petitioner fell when captured. Therefore, we cannot say that the petitioner was actually prejudiced by this erroneous reading of two prior felony convictions to the jury without an accompanying limiting instruction.[86]

The reasoning and language of the court in *Thomas* are virtually identical to that appearing in harmless-error cases in which the "overwhelming evidence" test is applied.[87]

The "reasonable possibility" approach to harmless-error analysis which, unlike the "overwhelming evidence" test, focuses on the prejudicial effect of the tainted evidence, also has been widely used by the lower courts in defining actual prejudice. A good example is *United States v. Underwood*,[88] a section 2255 proceeding involving the procedural default of a fourth amendment claim. In *Underwood*, the petitioner, who had been convicted of selling two ounces of cocaine, alleged that the police had made a warrantless search of his apartment resulting in the unlawful seizure of additional cocaine. At petitioner's trial for the sale of the two ounces, the only reference to the additional cocaine came during the testimony of a police officer who mentioned that he had sent a substance described by the petitioner as cocaine to a police lab for chemical analysis. That testimony, however, corroborated other admissible evidence contradicting petitioner's entrapment defense. Furthermore, petitioner's counsel failed to make a timely motion to suppress the officer's testimony.

The district court, denying collateral relief because of the procedural default interpreted the actual prejudice standard as "requir[ing] the petitioner simply to show that the suppressible evidence could have contributed to the jury verdict, thus incorporating the harmless error standard of *Chapman v. California*."[89] Applying this standard to the facts at issue, the court concluded:

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[86] *Id.* at 698-99 (emphasis added).

[87] See text accompanying notes 68-70 *supra*.

[88] 440 F. Supp. 499 (D.R.I. 1977).

> [P]rejudice in fact has not been shown: the courtroom procedure and testimony, at best, played a minor role in the jury verdict. Indeed, the jury might well have concluded that the allegedly illegally obtained evidence was not cocaine since no evidence to that effect was introduced.
>
> Because the prejudice is harmless error beyond a reasonable doubt, the Court will not grant relief from petitioner's 'waiver' [of his fourth amendment claim].[90]

This case, therefore, is similar to *Thomas* insofar as both apply a variant of harmless error analysis, but different insofar as the former focuses on the prejudicial effect of the tainted evidence whereas the latter focuses on the sufficiency of the untainted evidence.

Not all courts, however, have applied harmless-error analysis. The court in *Robertson v. Collins*[91] specifically held that the Black-Friendly "colorable showing of innocence" requirement and not a variant of the harmless-error test should govern the definition of actual prejudice. The court, after analyzing *Sykes* and Judge Friendly's seminal commentary on the scope of habeas corpus,[92] stated that "[t]he prejudice standard adopted in *Davis, Francis*, and now [*Sykes*] serves to embody precisely the limited habeas review which Judge Friendly had in mind . . . to prevent the miscarriage of justice which results from convicting an innocent person."[93] Reviewing in detail the evidence introduced at the petitioner's murder trial, the court held that the use of jury instructions inconsistent with *Mullaney v. Wilbur*[94] had not created actual prejudice. The court concluded that, on the basis of the "weak testimony" presented on behalf of the petitioners and the testimony of two eyewitnesses who identified the petitioner as the murderer, the petitioner "failed to raise even a colorable showing of innocence."[95]

The *Robertson* court not only employed the Black-Friendly test; it explicitly rejected use of harmless-error analysis as inconsistent with *Sykes* for two reasons: (1) the harmless-error test treats some claims as per se harmful whereas the *Sykes* Court, in rejecting use of an "inherent prejudice" standard, emphasized the petitioner's factual guilt,[96] and (2) the *Chapman* test focuses upon the effect of an error on the trial judgment whereas the "colorable showing of innocence test" "would permit habeas review in this case if petitioner could present evidence tending to support his innocence."[97] The habeas petitioner in *Robertson* would therefore be allowed to present evidence in support of his petition that was not presented to the trial court. By virtue of this reasoning, the *Robertson* court thus became the first lower federal court specifically to reject use of harmless-error reasoning in favor of the Black-Friendly approach.[98]

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[89] *Id.* at 503.

[90] *Id.* at 503-04.

[91] Civ. No. Y-78-1544 (D. Md. Feb. 23, 1979).

[92] *See* Friendly, *Is Innocence Irrevelant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

[93] Civ. No. Y-78-1544, slip op. at 14 (D. Md. Feb. 23, 1979).

[94] 421 U.S. 684 (1975).

[95] Civ. No. Y-78-1544, slip op. at 18 (D. Md. Feb. 23, 1979).

This more rigorous definition of actual prejudice is not inconsistent with *Sykes*. In *Sykes*, the Court, without even having to consider the inculpatory statements challenged on *Miranda* grounds, was convinced that "[t]he other evidence of guilt presented at trial . . . was substantial to a degree that would negate any possibility of actual prejudice resulting to respondent from the admission of his inculpatory statements."[99] It was unnecessary on the facts in *Sykes*, absent a proffer of exculpatory evidence not adduced at trial, to decide whether the inquiry into actual prejudice might include an examination of *all* available evidence, even that which is assertedly tainted. To include such evidence in the actual prejudice inquiry would be to make it more difficult for habeas petitioners asserting non-truth-furthering rights (for example, *Miranda* and fourth amendment claims) to overcome a procedural default, inasmuch as the assertedly tainted evidence in such cases is often both reliable and highly probative of guilt. It is impossible to discern on the basis of the *Sykes* decision alone, however, whether the Supreme Court will agree with the more restrictive definition of actual prejudice suggested in *Robertson*.

Yet another way to narrow the scope of collateral relief in cases where the petitioner has failed to comply with a state procedural rule in raising a non-truth-furthering claim would be to define "actual prejudice" in terms of the distinction in *Stone v. Powell* between truth-furthering and non-truth-furthering claims.[100] That *Stone* might potentially inform the meaning of actual prejudice is suggested not only by Justice Brennan's passing comment to that effect in *Sykes*,[101] but also by two lower court decisions, *Sincox v. United States*,[102] and *Graham v. Maryland*.[103] In each case, the court concluded that on the basis of the claim asserted the petitioner had demonstrated actual prejudice. Moreover, each petitioner asserted truth-furthering rights: *Sincox* involved a claim that petitioner had been convicted by a less than unanimous jury, and *Graham* involved a claim that the trial court had unconstitutionally allocated to petitioner the burden of proving an alibi defense.[104] Accordingly, if *Stone* were to inform the meaning of actual prejudice, the petitioners in these two cases would be able to demonstrate actual prejudice attendant to the foreclosure of their claims.[105]

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[96] *But see* note 106 *infra*.

[97] Civ. No. Y-78-1544, slip op. at 18 n.6 (D. Md. Feb. 23, 1979).

[98] In Collins v. Auger, 577 F.2d 1107, 1110 (8th Cir. 1978), the court analyzed actual prejudice in terms of both harmless-error analysis and what it termed "a subjective evaluation of guilt by an appellate court based on an overall record." The latter, like the Black-Friendly approach, focused on the petitioner's factual guilt based on all available evidence. The court, finding an absence of actual prejudice under either approach, had no occasion to choose between them.

[99] 433 U.S. at 91.

Sincox and *Graham* may also be read as cases where courts, in defining actual prejudice in terms of harmless error, have concluded that the claims there presented were per se harmful.[106] This analysis is consistent with *Chapman v. California*,[107] where the Court noted that some constitutional rights are so basic to a fair trial that their infraction is intrinsically harmful.[108] Both *Sincox* and *Graham* involved constitutional claims fundamental to the right to a fair trial. In *Sincox*, the court noted:

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[100] See notes 54-60 & accompanying text *supra*.

[101] 433 U.S. at 110 (Brennan, J., dissenting). See note 83 *supra*.

[102] 571 F.2d 876 (5th Cir. 1978).

[103] 454 F. Supp. 643 (D. Md. 1978).

[104] The rights asserted in *Sincox* and *Graham* are truth-furthering in the sense that they increase the accuracy of the trier-of-fact's determination that an individual in fact committed the crime for which he was convicted. See notes 57-59 *supra*.

[105] The fact that the Court in *Sykes* rejected the Fifth Circuit's conclusion that prejudice was "inherent" in the state prisoner's *Miranda* claim is not inconsistent with this *Stone* approach insofar as a *Miranda* claim is not a truth-furthering right.

[106] A per se approach to analyzing actual prejudice is not necessarily inconsistent with *Sykes*, even though the Court there reversed the lower court which had found actual prejudice inherent in petitioner's claim. It is significant that, while the lower court characterized petitioner's claim as an involuntary statement, 528 F.2d at 524-25, the Supreme Court recharacterized it as a *Miranda* violation, 433 U.S. at 74-75. Although an involuntary confession is probably per se harmful, *see* Mincey v. Arizona, 437 U.S. 385, 398 (1978), Chapman v. California, 386 U.S. 18, 23 n.8 (1967); *but see* Milton v. Wainwright, 407 U.S. 371, 372 (1972) (Court applies harmless-error analysis to habeas petition alleging involuntary confession and violation of sixth amendment rights), it is doubtful that a *Miranda* violation enjoys the same status. Accordingly, the fact that the lower court in *Sykes* was reversed on its per se approach to actual prejudice may simply reflect the fact the Supreme Court took a different view of the type of claim there presented. *But see* Robertson v. Collins, Civ. No. Y-78-1544 (D. Md. Feb. 23, 1979).

[107] 386 U.S. 18 (1967).

[108] *Id.* at 23. See note 64 *supra*.

> Sincox had a fundamental right guaranteed by the Sixth Amendment that if convicted at all it would be a valid, unanimous jury verdict of guilt. He was adjudged guilty on the strength of an invalid, eleven out of twelve verdict. He had an absolute right to present that error on appeal and persistently asserted his desire to appeal, yet no appeal was taken. The "prejudice" hurdle is quickly overcome.[109]

Moreover, the court in *Graham* expressly concluded that the harmless-error doctrine was inapplicable to the claim there presented, that is, an improper allocation of the burden of proof.[110] Thus, *Sincox* and *Graham* represent cases where results are consistent with both the *Stone* distinction between truth-furthering rights and non-truth-furthering rights, and a per se harmless-error approach.

This survey of the lower court decisions reveals that the vast majority of courts have followed the lead of the Court in *Sykes* in applying a variant of harmless-error analysis to define actual prejudice. That the *Sykes* Court left open for future resolution the precise definition of actual prejudice, however, has permitted other courts to explore different approaches to defining the term. One court has applied the more rigorous "colorable showing of innocence" requirement. Still other courts have found actual prejudice in cases involving claims that may be viewed either as truth-furthering rights under *Stone v. Powell* or as per se harmful under the exception to *Chapman v. California*. None of these approaches is inconsistent with *Sykes*, but each may yield different results in a given case. It remains, therefore, for the Supreme Court to resolve this conflict among the lower courts.

Cause

The other prong of the *Sykes* waiver standard bars habeas review in a procedural default case unless the petitioner can show "cause" for not raising his claim in accordance with state procedural rules. The *Sykes* decision, however, offers scant guidance in defining cause. The Court's observation that "[r]espondent has advanced no explanation whatever for his failure to object at trial [to the testimony offered by the police officers],"[111] reveals only that the habeas petitioner bears the burden of showing cause.

The concept of cause focuses on why the petitioner failed to raise his claim in accordance with state procedures and whether those reasons are sufficient to excuse the petitioner's procedural default. Thus, one court has defined cause as "a reasonable and valid explanation [for failure to comply with a state rule] other than a tactical decision to forego the available avenue of redress."[112] The classic example of cause is the situation in which a defendant could not have discovered the factual predicate for a legal claim at the time the claim should have been asserted.[113] It is difficult to imagine a more reasonable and valid explanation for a procedural default than the unavailability of the evidence underlying a claim.

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[109] 571 F.2d at 879.

[110] 454 F. Supp. at 651.

[111] 433 U.S. 72, 91 (1977).

This section addresses a more complex issue: what, if any, attorney conduct will constitute a reasonable and valid explanation for a failure to abide by a procedural rule? That the lower federal courts have focused on this particular problem is a predictable outgrowth of *Sykes*, for a major foundation of the Court's decision was the majority's desire to deter "sandbagging,"[114] that is, the reasoned decision of an attorney to delay raising a constitutional claim on behalf of his client for tactical purposes.

The majority did not explicitly address itself, however, to the question of whether an attorney's excusable or inadvertant conduct should be treated in the same manner as a tactical decision or whether such conduct is a reasonable and valid explanation for the procedural default. A habeas petitioner will inevitably suggest that he is being treated unfairly unless such behavior is deemed to be cause for his failure to raise a claim. In resolving this issue, a court is compelled to address itself to the legal and policy reasons for "binding" a defendant to his attorney's conduct.

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[112] Graham v. Maryland, 454 F. Supp. 643, 648 (D. Md. 1978).

[113] Two Rule 12 cases illustrate the point. A panel in the Second Circuit held that a defendant did not waive his right to make a motion to suppress evidence where the prosecution had "failed to disclose to [the defendant] his intention to introduce the evidence required by [Rule 12d] and [had violated] the understanding that all evidence discoverable under Rule 16 would be turned over" to the defendant at the time the defendant's motion should have been made. United States v. Reed, 572 F.2d 412, 417 n.2 (2d Cir. 1978). In dictum, another federal court excused a waiver of a claim based on grand jury proceedings where the defendant could not have raised the claim prior to trial because he had not yet received a transcript of the grand jury proceedings. But the court held that the defendant's failure to raise the claim during trial once he received a copy of the transcript *was* a waiver under Rule 12. United States v. Kaplan, 554 F.2d 958, 970 n.7 (9th Cir. 1977), *cert. denied*, 434 U.S. 956 (1978).

Similarly, the Supreme Court in Shortwell Mfg. Co. v. United States, 371 U.S. 341, 362-63 (1963) held that cause did not exist because the "facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial." See text accompanying notes 17-19 *supra*. *See also* Arnold v. Wainwright, 516 F.2d 964, 971 n.11 (5th Cir. 1975) (availability of information is a key factor in finding cause under Rule 12), *cert. denied*, 426 U.S. 908 (1976).

[114] See text accompanying note 22 *supra*.

Policy Considerations

The opinions in *Sykes* reveal two rationales for so binding a habeas petitioner. The first views the criminal defendant as the principal responsible for the actions of his agent, the trial lawyer.[115] The theory is that "the lack of skill and incompetency of the attorney is imputed to the defendant who employed him, the acts of the attorney becoming those of his client."[116] Although some courts continue to embrace this agency rationale,[117] its applicability in a criminal context has been attacked by a leading commentator who has articulated two reasons why the rationale fails to portray accurately the relationship between a criminal defendant and his attorney. First, the basic tenet of agency law evolved in order to protect an innocent third party from an agent's representations. In criminal cases, however, "there is no innocent beneficiary of the accused's agency-born liability for the ineptitude of his retained attorney-agent," and secondly, a criminal defendant is usually incapable of performing the normal role of the principal by supervising his agent, the attorney.[118] Second, an agency relationship assumes the presence of a principal who is capable of supervising his agent. A criminal defendant, however, is usually not equipped to exert the requisite direction.[119] The procedural posture of a procedural default case exacerbates the general inability of a criminal defendant to supervise his attorney. Even a defendant who participates in the formulation of his defense and who is cognizant of rights personal to him is less likely to be well acquainted with procedural rules mandating waivers due to attorney inaction.[120] Thus, the agency rationale appears particularly inapplicable as a justification for binding a habeas petitioner to his attorney's conduct.

The second rationale evidenced in *Sykes* for binding a criminal defendant to the acts of counsel focuses on the needs of the adversary system.[121] That system is premised on the view that truth is best discovered and justice best meted out through a process in which each party bears the burden of investigating and presenting its case before an impartial tribunal. Accordingly, the Supreme Court has stated that trial-type decisions must be left in the hands of counsel who have the authority to make tactical decisions.[122] In his *Sykes* concurrence, Chief Justice Burger contended that a defendant's inability to exercise the expertise provided by trial counsel and the practical difficulties of interrupting a trial to insure that a client fully agrees with each tactical decision support this grant of authority to trial counsel.[123] Yet the conclusion that an attorney must be free to make tactical decisions at trial does not offer a full explanation of the reasons why a criminal defendant should always be held accountable for his attorney's inadvertance or error.

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[115] Wainwright v. Sykes, 433 U.S. 72, 114 n.13 (1977) (Brennan, J., dissenting).

[116] Tompsett v. Ohio, 146 F.2d 95, 98 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945).

[117] *See, e.g.*, Gallup v. State, 559 P.2d 1024, 1027 (Wyo. 1977); State v. Hall, 554 P.2d 755 (Mont. 1976).

[118] Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. Rev. 289, 297 (1964).

[119] *Id.*

[120] Chief Justice Burger has noted that "it is because ' "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law" ' that we held it constitutionally required that every defendant who faces the possibility of incarceration be afforded counsel." 433 U.S. at 93 (Burger, C.J., concurring).

[121] *Id.* at 93-94 (Burger, C.J., concurring); *id.* at 114 n.13 (Brennan, J., dissenting).

The decision to hold that a criminal defendant must be bound to his attorney's conduct cannot be separated from the larger issue of the availability of habeas corpus in federal courts to attack prior state convictions. If a civil defendant is found liable for money damages in a breach of contract action because of his lawyer's negligence, the defendant can be made whole by instituting a successful malpractice suit. A criminal defendant who suffers from his lawyer's negligence has no equivalent remedy because even a successful malpractice action will not result in his freedom. Any meaningful remedy derives from a collateral attack on the judgment. This too differs from the civil context, in which no collateral attack is available against a winning party because of error or misconduct engaged in by the losing party's counsel. These obvious distinctions between civil and criminal litigation suggest that while the needs of the adversary system may predominate in one context, they may be outweighed by the need for collateral attack in another.

The primary concerns in defining the scope of collateral attack are the state interest in finality, judicial efficiency, and federalism, on the one hand,[124] and the habeas petitioner's right to vindicate his innocence, on the other.[125] Consider the case of a habeas petitioner who demonstrates that his attorney, acting negligently but within the bounds of constitutionally effective assistance of counsel, failed to adhere to a state procedural rule, and thus did not present a meritorious claim that the petitioner had been denied his constitutional right to a fair and impartial petit jury. Assuming that the petitioner has demonstrated actual prejudice, the question posed is whether the petitioner's interest in redressing unjust incarceration is outweighed by the need of the adversary system to bind clients to the conduct of their lawyers and the state interest in finality, judicial efficiency, and federalism. Whichever way the question is resolved, the cause test has suddenly become the fulcrum of deciding whether a possibly innocent person should be permitted to procure relief for violation of his constitutional rights.

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[122] *See* Estelle v. Williams, 425 U.S. 501, 512 (1976); Henry v. Mississippi, 379 U.S. 443, 451 (1965).

[123] Wainwright v. Sykes, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring). *See also id.* at 95 (Stevens, J., concurring).

[124] *See* Wainwright v. Sykes, 433 U.S. 72, 88-90 (1977); Schneckloth v. Bustamonte, 412 U.S. 218, 259-66 (1973) (Powell, J., concurring).

[125] *See* Stone v. Powell, 428 U.S. 465, 491 n.31 (1977); Schneckloth v. Bustamonte, 412 U.S. 218, 256-68 (1973) (Powell, J., concurring).

The lower federal courts applying *Sykes* can resolve the tension between the defendant's interest and the combined demands of the adversary system and the state's interests in one of two ways. First, courts may ignore the defendant's interest and focus solely on whether the needs of the adversary system along with the state's interests are served by classifying a certain type of attorney conduct as cause. This approach treats the cause factor as an inquiry exclusively into whether the attorney's conduct is a valid and reasonable explanation for a procedural default. Such an inquiry would not take into account the defendant's interest no matter how compelling, relegating it instead to the actual prejudice portion of the cause-and-prejudice test. Second, courts may consider the defendant's interest along with the state's interests and the needs of the adversary system, and relax the preclusive effect of the cause requirement if the defendant may be unjustly incarcerated. This approach, although avoiding the possibility that an innocent person could be kept in prison because his attorney erred, transforms cause from half of a conjunctive test into a factor that assesses whether social justice would be served by barring consideration of the habeas petitioner's constitutional claims on the merits.

The Lower Court Decisions

The recent decisions of the lower federal courts applying the *Sykes* test generally speak the language of the first approach outlined above, but the results of the cases generally reflect the second approach. Court opinions treating cause as a factor that looks only to the needs of the adversary system and the state interest in finality have disagreed sharply over what, if any, constitutionally effective attorney conduct provides a reasonable and valid explanation for a procedural default. But the same decisions, when viewed from the vantage point of the second approach, which considers the defendant's interest in securing relief from unjust incarceration, form a more consistent pattern. The decisions show that the types of attorney conduct that constitute cause significantly expand if a habeas petitioner presents the spectre of continuing unjust incarceration.

Cause Defined Solely in Terms of Attorney Conduct

A survey of the recent decisions that have applied *Sykes* reveals that a lawyer's failure to raise a claim may constitute cause if the attorney's conduct was (1) constitutionally ineffective assistance of counsel, (2) excusable because the lawyer either acted negligently or because no lawyer could reasonably have been expected to raise the claim, or (3) not in fact a strategic decision.

An attorney's strategic or tactical decision not to raise a claim will not constitute cause,[126] but a finding of ineffective assistance of counsel will. This issue arose in *Sincox v. United States*,[127] where a federal prisoner sought to vacate his conviction on the ground that he had been denied the right to a unanimous jury trial. Trial counsel had neither raised this claim at trial nor filed an appeal in spite of the prisoner's requests that he do so. The court in *Sincox* characterized the attorney's actions as constituting denial of the right to effective assistance of counsel and found that *Sykes* cause existed.[128] Similarly, in *Rinehart v. Brewer*,[129] the Eighth Circuit found ineffective assistance of counsel one ground for its holding that the petitioner had shown cause for his failure to bring the claim of an involuntary guilty plea to the attention of the trial court.[130]

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[126] Satterfield v. Zahradnick, 572 F.2d 443, 446 (4th Cir. 1978); Rodriguez v. Estelle, 536 F.2d 1096, 1097 (5th Cir. 1976); United States v. Hearst, No. CR-74-364 (N.D. Cal. Nov. 7, 1978). In the two circuit court cases the courts found that the procedural error that constituted a *Sykes* waiver was also a deliberate by-pass under *Fay v. Noia*. These findings may support Justice White's belief that "the deliberate by-pass rule of *Fay v. Noia* affords adequate protection to the State's interest in insisting that defendants not flout the rules of evidence." Wainwright v. Sykes, 433 U.S. 72, 98 (1977) (White, J., concurring).

[127] 571 F.2d 876 (5th Cir. 1978).

[128] *Id.* at 879-80.

[129] 561 F.2d 126 (8th Cir. 1977).

[130] *Id.* at 130 n.6. *See also* Salter v. Johnson, 579 F.2d 1007, 1009 (6th Cir. 1978) (rejecting appellant's contentions that trial counsel's ineffective assistance caused noncompliance with procedural rule because the trial counsel was not ineffective); Strazella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 478 (1977). *But cf.* Porter v. Leeke, 457 F. Supp. 253, 259-60 n.7 (D.S.C. 1978).

A claim of ineffective assistance of counsel may therefore serve double duty, standing both as an independent claim of a constitutional violation and cause for failure to assert any other claim not raised due to ineffective counsel. However, not every ineffectiveness claim will establish cause—for example if the asserted ineffectiveness at trial was not raised on appeal by a different lawyer representing the defendant—and not every instance of cause

The eleven circuit courts of appeals have adopted different standards to define ineffective assistance of counsel. The First, Second, and Tenth Circuits continue to measure ineffectiveness claims by the traditional "mockery-of-justice" formula.[131] The Fifth, Sixth, and Ninth Circuits have assured each criminal defendant counsel "reasonably likely to render and rendering reasonably effective assistance."[132] The Third and Eighth Circuits have held that an attorney in a criminal trial must exercise "the customary skill and knowledge which normally prevails at the time and place."[133]

These varying standards have made it difficult, in the abstract, to predict whether a single instance of lawyer failure to raise a claim pursuant to a state procedural requirement will constitute ineffective assistance of counsel. Under either the Third and Eighth Circuit's "community standards" approach or the Fifth Circuit's "reasonable lawyer" rule, courts review "all aspects of defense counsel's assistance to the accused."[134] Thus, lawyer conduct that may constitute ineffective assistance in one context, may not in another. In *United States v. Easter*,[135] where trial counsel failed to object to the legality of a police search of the defendant's home and the seizure of a shotgun found during the search, the court held that a single lawyer error amounted to ineffective assistance of counsel. Finding the attorney's conduct so "derelict" as to constitute ineffective assistance,[136] the court noted that counsel must assert a claim that may be his client's only defense, particularly "when that defense has a factual basis and there is a recognized and obvious means to suppress evidence which has allegedly been ille-

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due to attorney conduct demands a showing of constitutionally ineffective counsel. *See* text accompanying notes 141-179 *infra*.

[131] *See* United States v. Taylor, 562 F.2d 1345, 1360 (2d Cir. 1978); United States v. Ramirez, 535 F.2d 125, 129-30 (1st Cir. 1976); United States v. Dingle, 546 F.2d 1378, 1385 (10th Cir. 1976).

[132] Cooper v. Fitzharris, 551 F.2d 1162 (9th Cir. 1977); Beasly v. United States, 491 F.2d 687, 693-96 (6th Cir. 1976); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974).

[133] United States v. Johnson, 531 F.2d 169 (3rd Cir. 1976); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976), *cert. denied*, 433 U.S. 844 (1977). The remaining circuits use a variety of standards. *See* United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973) (reasonably competent assistance of an attorney acting as his client's conscientious advocate); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977) (whether defense counsel's representation is "within the range of competence demanded of attorneys in criminal cases"); United States v. Warden, 545 F.2d 21, 23-24 (7th Cir. 1976) (a minimum standard of professional representation).

[134] Note, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J. OF L. & SOC. PROB. 1, 41 (1977).

[135] 539 F.2d 663 (8th Cir. 1976), *cert. denied*, 433 U.S. 844 (1977).

[136] *Id.* at 665.

gally seized."[137]

A class of cases exists, however, in which attorney error does not constitute ineffective assistance of counsel. For example, the Fifth Circuit in *McDonald v. Estelle*,[138] held that an attorney's failure to object to the introduction of prior uncounseled convictions at the punishment phase of a trial did not rise to the level of ineffective assistance of counsel, even though the introduction of such evidence did constitute reversible error.[139] Similarly, the court in *Arnold v. Wainwright* found that although trial counsel had not been reasonably diligent in investigating a claim, their error did not constitute ineffective assistance.[140]

Federal courts thus have evaluated whether constitutionally effective attorney conduct will provide cause for failure to raise a claim either based on whether it is excusable when compared to the behavior of other attorneys or because it is nonstrategic. The suggestion that certain attorney conduct may be "excusable," thereby allowing litigation of the constitutional claim, originates in the *Sykes* Court's citation with approval of Justice Powell's earlier concurrence in *Estelle v. Williams*.[141] In *Williams*, a majority of the Court held that a state defendant's due process rights are infringed if he is compelled to appear at trial wearing prison clothes but not if he appears in prison garb without objection.[142] Justice Powell took a different tack. He proposed that a state court conviction should be left standing if the defendant "has made an 'inexcusable procedural default' in failing to object at a time when a substantive right could have been protected."[143] Applying the test to the facts under review, Justice Powell found that the due process claim had not been raised because Williams' attorney believed, incorrectly, that an objection would have been futile. In fact, the state trial court judge had allowed defendants to stand trial in civilian clothing if they wished, and both the state courts and the federal court of appeals for that state had recognized that trial in prison clothing could be considered constitutional error.[144]

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[137] *Id.* at 666.

[138] 536 F.2d 667 (5th Cir. 1976), *vacated and remanded for consideration in light of Wainwright v. Sykes*, 433 U.S. 904 (1977), *remanded for consideration of "cause,"* 564 F.2d 199 (5th Cir. 1977).

[139] *Id.* at 670-72.

[140] 516 F.2d 964, 971 (5th Cir. 1975), *cert. denied*, 426 U.S. 908 (1976).

[141] 425 U.S. 501, 513 (1976) (Powell, J., concurring), *cited in* 433 U.S. at 89 n.13. See note 14 *supra*.

[142] 425 U.S. at 512-13.

[143] *Id.* at 513-14 (Powell, J., concurring).

[144] *Id.* at 514 (Powell, J., concurring).

Justice Powell's "inexcusable procedural default" test was originally proposed by Professor Henry Hart prior to the Supreme Court's decision in *Fay v. Noia*.[145] Professor Hart criticized the state of the law that allowed state prisoners to relitigate in federal habeas court constitutional claims that had been considered by state courts, but barred habeas review if an adequate and independent state procedural ground would have precluded review of the constitutional claim on direct appeal to the Supreme Court.[146] Nevertheless, Professor Hart believed that the power of state courts to regulate their own procedure mandated that "[r]easonable consequences" flow from a failure to comply with "reasonable procedural rules."[147] Accordingly, he suggested that "[t]here is room . . . for a distinct doctrine of inadvertant loss of [federal constitutional rights] by inexcusable procedural default."[148]

Use of the "inexcusable procedural default" formulation to define cause requires a definition of what sort of attorney conduct is excusable. The attempts of several courts to analyze an attorney's failure to raise a claim in terms of a reasonableness test suggests two possibilities.[149] The first is that cause is shown where an attorney has acted unreasonably in not raising a claim. In *Jiminez v. Estelle*,[150] a panel of the Fifth Circuit suggested in dicta that a habeas petitioner, by demonstrating that his lawyer knew of the facts underlying his claim and that any reasonable attorney so apprised would have raised the claim, could show *Sykes* cause for his lawyer's failure to object to the introduction at trial of prior uncounseled convictions. The court also noted that insofar as the lawyer had objected to the introduction of the evidence on other grounds, petitioner could demonstrate that counsel's failure to object was not strategic. The particularity with which the court detailed the course of such a claim indicates that the *Jiminez* court would hold it to satisfy the *Sykes* cause standard. At least two courts have read *Jiminez* in this fashion[151] and two others have specifically stated that similarly unreasonable attorney conduct is cause.[152]

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[145] Hart, *The Supreme Court, 1958 Term—Forward: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

[146] "Apart from the difficulty of reconciling *Brown v. Allen* and *Daniels v. Allen* in terms of the felt sense of justice, the distinction between the two cases . . . puts pressure on the state judicial systems in exactly the wrong direction. It tells the state courts that the more liberal they are in considering the federal constitutional claims of state prisoners on the merits the more freely they will be subjected to the delays and the indignity, as it is often felt to be, of federal-court review of their decisions, whereas the more astute they are to lay procedural traps for criminal defendants the surer they will be of immunizing their decisions from federal examination." *Id.* at 118.

[147] *Id.*

[148] *Id.*

[149] Although the courts that have found certain attorney conduct to be excusable have not directly addressed the issue of whether strategic decisions may be excusable, the notion of a reasonableness test suggests that the distinction between strategic and nonstrategic behavior may not control the "excusable" issue. *See* 433 U.S. at 99 (White, J., concurring) (an attorney's decision not to raise a claim of which he is aware will not constitute a deliberate by-pass unless the failure to raise a claim "is sufficiently egregious to demonstrate that the services of counsel were not 'within the range of competence demanded of attorneys in criminal cases.' McMann v. Richardson, 397 U.S. 759, 771 (1970)"). *But cf.* United States v. Hearst, No. CR-74-364 (N.D. Cal. Nov. 7, 1978) (a defense counsel's tactical choice cannot serve as the basis for a claim of ineffective assistance of counsel).

[150] 557 F.2d 506, 511 (5th Cir. 1977).

The leading case to suggest that unreasonable attorney conduct will not constitute cause was handed down in *Arnold v. Wainwright*[153] by a different panel of the Fifth Circuit. The court in *Arnold* held that a state prisoner who had failed to assert his right under state law to challenge the selection of the petit jury was barred from seeking habeas corpus relief on the waived claim. Although the court specifically declined to find that the prisoner's trial counsel had been constitutionally ineffective, the court affirmed the district court's finding that counsel did not exercise reasonable diligence in investigating the possibility of a claim based on unconstitutional jury selection procedures.[154] Nevertheless, the court refused to accept the view that an attorney's failure to exercise reasonable diligence should relieve a petitioner from the effect of the error. The court justified its decision by explaining that enforcement of the state procedural default would (1) induce attorneys to pursue more vigorous investigations of their clients' legal claims,[155] (2) encourage the litigation of all claims during a single judicial proceeding, and (3) further ensure the finality of criminal judgments.[156]

Underlying the *Arnold* decision is the assumption that a judicially imposed forfeiture of constitutional rights, even for failure of an attorney to exercise reasonable diligence, will deter future attorney error. This assumption rests upon the familiar principle of tort law that a reasonable standard of care may impose a greater duty than the prevailing practice or custom. For example, Judge Learned Hand's opinion in *The T.J. Hooper*,[157] cited in *Arnold v. Wainwright*,[158] held that tugboat operators acted unreasonably in not carrying radio receiving equipment, even though such equipment was not commonly used at the time of the decision.[159] Similarly, *Arnold v. Wainwright* may stand for the proposition that the *Sykes* test is designed not only to foreclose deliberate by-pass, but also to induce attorneys to act more carefully in assessing their clients' possible claims.

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[151] *See* Porter v. Leeke, 457 F. Supp. 253, 259 n.7 (D.S.C. 1978); Cole v. Stevenson, 447 F. Supp. 1268, 1273 (E.D.N.C. 1978).

[152] Farrow v. United States, 580 F.2d 1339, 1356-57 (9th Cir. 1978) (en banc); Collins v. Auger, 451 F. Supp. 22, 28 (S.D. Iowa 1977), *vacated and remanded*, 577 F.2d 1107 (8th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3497 (U.S. Jan. 22, 1979).

[153] 516 F.2d 964 (5th Cir. 1975), *cert. denied*, 426 U.S. 908 (1976). The court in *Arnold* applied the waiver standard of *Davis v. United States*, see text accompanying notes 11-13 *supra*, precursor of the *Sykes* test, to a habeas petition brought by state prisoners. *Id.* at 967.

[154] *Id.* at 971.

[155] *Id.* at 971 & n.12.

[156] *Id.*

The deterrent effect assumed in *Arnold* has two corollary principles: that courts are not treating criminal defendants unjustly by refusing to hear habeas petitions in order to improve the performance of lawyers in general; and that courts, by so doing, will garner a level of deterrence higher than would otherwise be achieved. Justice Brennan, for one, disputes the second assumption. He suggested in his *Sykes* dissent that the forfeiture of state remedies and direct review in the United States Supreme Court sufficiently encourages attorneys to upgrade the quality of their representation without the need for forfeiture of habeas corpus relief.[160]

The second possibility for defining cause in terms of a reasonableness standard is found in cases holding that cause is shown when an attorney's failure to raise a claim conforms completely with the expected and reasonable behavior of the bar. The approach is similar to the classic formulation of cause enunciated in Rule 12 cases—cause is shown when a defendant could not be expected to have discovered the factual predicate for a legal claim at the time the claim should have been presented.[161] Here, however, the factual predicate is clear, but the legal basis for the claim is not.

In *Cole v. Stevenson*,[162] a state prisoner was convicted of second degree murder after a jury trial and his conviction was affirmed by the North Carolina Supreme Court in 1971. Three years later, the Supreme Court in *Mullaney v. Wilbur*[163] held unconstitutional a state law imposing on a criminal defendant the burden of proof in reducing a murder charge to manslaughter. In 1977, the Supreme Court in *Hankerson v. North Carolina*[164] applied *Mullaney* retroactively. After both cases were decided, Cole filed a petition for habeas corpus relief alleging that he had been forced to shoulder evidentiary burdens inconsistent with *Mullaney*. The district court, assuming for the purposes of decision that Cole's objections to the burden of proof jury instructions should have been, but were not, raised on direct appeal, considered whether cause existed.

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[157] 60 F.2d 737, 740 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

[158] *See* 516 F.2d at 971 n.12.

[159] Judge Hand wrote: "There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence . . . . Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices . . . . Courts must in the end say what it required; there are precautions so imperative that even their universal disregard will not excuse their omission." 60 F.2d at 740.

[160] *See* 433 U.S. at 113 (Brennan, J., dissenting).

[161] See note 113 & accompanying text *supra*.

[162] 447 F. Supp. 1268 (E.D.N.C. 1978).

[163] 421 U.S. 684 (1975).

The court noted that Justice Powell, in his *Williams* concurrence, had emphasized that the policies underlying the availability of habeas corpus "need not be carried to the length of allowing counsel for a defendant deliberately to forego objection to a curable trial defect, even though he is aware of the factual and legal basis for an objection, simply because he thought objection would be futile."[165] In the court's view, Justice Powell's concurrence "[could] be interpreted as necessitating an attorney have knowledge of his client's right and purposefully or erroneously not except to its violation."[166] The court observed that at the time of Cole's trial in North Carolina, the bar "had no inkling" that the state's standard jury instructions were constitutionally invalid, and that "few, if any attorneys" would have seen reason to object. There was, therefore, "no deliberation, no awareness and no tactical choice" underlying failure to raise the *Mullaney* claim. Accordingly, the court held that cause exists where a constitutional violation "not perceived by the bar or bench" was foregone.[167]

The district court's opinion in *Cole v. Stevenson* is significant in two respects. First, it suggests that attorney conduct is not excusable under Justice Powell's formulation if the lawyer knew of the claim but negligently failed to raise it. Second, it holds that an attorney's reasonable lack of knowledge of a constitutional claim is cause. *Cole v. Stevenson* may not be compelled by Justice Powell's concurrence, but it is at least not barred by it. Williams' counsel, "fully aware" of the prison clothes issue, did not raise it because he believed the claim would be unsuccessful.[168] Cole's counsel, by contrast, apparently neither knew, nor should have known, of the *Mullaney* claim.

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[164] 432 U.S. 233 (1977).

[165] 447 F. Supp. at 1273 (quoting Estelle v. Williams, 425 U.S. 501, 515 (1976) (Powell, J., concurring)).

[166] 447 F. Supp. at 1273.

[167] *Id.; accord*, Robertson v. Collins, Civ. No. Y-78-1544, slip op. at 9 (D. Md. Feb. 23, 1979); Graham v. Maryland, 454 F. Supp. 643, 648-49 (D. Md. 1978); Bromwell v. Williams, 445 F. Supp. 106, 114 (D. Md. 1977). *See also* Canary v. Bland, 583 F.2d 887, 894 (6th Cir. 1978) (Merrit, J., concurring) (cause exists where "neither the defendant nor his attorney could reasonably have been expected to know or appreciate the legal significance of the facts upon which the objection was based.").

Alternatively, some lower courts have focused not on whether the attorney's conduct, in a comparative sense, was excusable, but on whether, in fact, the attorney failed to raise a claim for nonstrategic reasons.[169] These courts begin with the assumption that inadvertant attorney conduct is not at the heart of the Supreme Court's concern with "sandbagging." Attorneys who inadvertantly fail to raise a claim are, by definition, not taking "their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off."[170] Further, two members of the *Sykes* Court suggested that Sykes' counsel may have acted for strategic purposes.[171] Accordingly, these courts have concluded that *Sykes* does not preclude the possibility that inadvertant attorney conduct is cause.

For example, the court in *Collins v. Auger*[172] noted that the *Sykes* court left "the impression that the possibility that defense counsel failed to object . . . as a part of trial strategy weighed heavily in the decision that there was no cause."[173] In the *Collins* case, the habeas petitioner alleged that he had been denied due process by the trial court's admission of psychiatric testimony disclosing inculpatory statements made by petitioner. Although trial counsel had objected to the testimony on three grounds,[174] he had not raised the due process objection. Nevertheless, the court found the attorney's failure, which resulted from his ignorance of the possible constitutional objection, to be cause.[175] Significantly, the *Collins* court, unlike the court in *Cole v. Stevenson*, did not inquire into the reasonableness of the attorney's conduct. The *Collins* test is accordingly a less stringent standard.

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[168] See text accompanying notes 141-44 *supra*.

[169] A theoretical distinction exists between nonstrategic and inadvertant defaults because an attorney may make an advertant decision not to raise a claim for nonstrategic purposes. Thus, a decision not to raise a seemingly frivolous claim is clearly advertant, yet it is not expected to yield strategic benefits. *See generally* Wainwright v. Sykes, 433 U.S. 72, 98-99 (1977) (White, J., concurring). For the purposes of this Article, the terms "inadvertant" and "nonstrategic" are used interchangeably, because it appears that appellate court judges reviewing attorney conduct will search the trial record for strategic purposes that might have motivated the attorney conduct, rather than ask whether the attorney conduct was, in fact, advertant or inadvertant. *See id.* at 96 (Stevens, J., concurring) ("The record persuades me that competent trial counsel could well have made a deliberate decision not to object to the admission of [Sykes'] in-custody statement."); Estelle v. Williams, 425 U.S. 501, 508 (1976) ("[I]nstances frequently arise where a defendant prefers to stand trial before his peers in prison garments. The cases show, for example, that it is not an uncommon defense tactic to produce the defendant in jail clothes in hope of eliciting sympathy from the jury."); *id.* at 514 (Powell, J., concurring) ("As is frequently the case with such trial-type rights as that involved here, counsel's failure to object in itself is susceptible of interpretation as a tactical choice.").

[170] Wainwright v. Sykes, 433 U.S. 72, 89 (1977).

[171] *See, e.g., id.* at 93 n.2 (Burger, C.J., concurring); *id.* at 96-97 (Stevens, J., concurring). *But see id.* at 104-05 (Brennan, J., dissenting).

[172] 451 F. Supp. 22 (1977), *vacated and remanded on other grounds*, 577 F.2d 1107 (8th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3497 (U.S. Jan. 22, 1979).

[173] *Id.* at 27 (footnote omitted).

Several judges, however, have rejected the view that nonstrategic attorney conduct will constitute cause.[176] To accept that view, the court in *Porter v. Leeke*[177] noted, would mean "every time a defendant's attorney failed to object . . . the defendant could assert that his attorney's ignorance of the need for an objection was 'sufficient' cause to avoid the *Wainwright v. Sykes* bar. This Court does not feel that the exception should be allowed to swallow the rule." This position derives support from both the rationale of *Arnold v. Wainwright* that use of the cause test can prevent future forfeiture, and the observation of Professor Hart that some inadvertant forfeitures rightfully preclude review. The danger that the exception will vitiate the rule emphasizes the difficulty in administering a cause standard that depends on whether an attorney's behavior is, in fact, nonstrategic. Although the *Porter* court was apparently concerned that all attorney inaction could be characterized as nonstrategic, it is at least as likely that the opposite would be true. An attorney testifying at a habeas corpus hearing may well attempt to protect his professional reputation and foreclose incipient malpractice actions by justifying even truly nonstrategic actions as intentional. In the absence of attorney testimony the availability of habeas corpus relief may turn on how a court assesses, on the basis of a written record, an attorney's motivation for inaction.[178] Either a reasonableness test, which compares attorney behavior to an accepted norm regardless of the individual attorney's intent, or the exclusion of nonstrategic behavior from the definition of cause would avoid this judicial burden.

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[174] Trial counsel argued that introduction of the psychiatrist's testimony violated the doctor-patient privilege, *Miranda*, and the hearsay rule. *Id.* at 25.

[175] *Id.* at 27-28. In affirming the district court's finding of cause, the Eighth Circuit specifically agreed that the trial counsel's failure "was not a matter of trial strategy, but was the result of counsel's unawareness of the due process violation," 577 F.2d at 1110 n.2, and met the test for cause. *Id.* at 1110. The court in Graham v. Maryland, 454 F. Supp. 643, 648 (D. Md. 1978), similarly found that cause existed for failure to raise a *Mullaney* claim where a state prisoner acting pro se was unaware of *Mullaney's* due process principle. The court stated that "tactical gamesmanship is certainly non-existent here. Petitioner had absolutely nothing to gain by holding this issue in reserve [during earlier post-collateral attacks on his state court conviction.]" *Id.* at 649.

[176] *See* Gates v. Henderson, 568 F.2d 830, 843 n.6 (2d Cir. 1977) (en banc) (Oakes, J., concurring); Brawer v. United States, No. 78 Civ. 3513 (S.D.N.Y. Dec. 14, 1978); Porter v. Leeke, 457 F. Supp. 253, 259-60 n.7 (D.S.C. 1978); Ramsey v. United States, 448 F. Supp. 1264, 1272 (N.D. Ill. 1978); United States v. Underwood, 440 F. Supp. 499, 502 (D.R.I. 1977).

[177] 457 F. Supp. 253, 259-60 n.7 (D.S.C. 1978).

In sum, the lower federal courts apparently agree that ineffective assistance of counsel is cause for failure to raise a claim. The courts have split sharply, however, when they have considered what, if any, constitutionally effective assistance of counsel provides a reasonable and valid explanation for a procedural default. By comparing the behavior of the habeas petitioner's attorney to the behavior of attorneys as a whole, some courts have suggested that cause exists when an attorney acts negligently or when he fails to raise a claim that no reasonable lawyer would have raised. Other courts have focused solely on whether the attorney's behavior was nonstrategic, while both the reasonableness approach, similar in nature to the "inexcusable procedural default" test, and the nonstrategic analysis have been rejected by still other courts interpreting *Sykes*.

Cause as a Balancing of Three Interests

If cause is a factor that considers only the needs of the adversary system and the state interest in finality, judicial efficiency and federalism, then the lower court decisions applying *Sykes* are hopelessly irreconcilable. Two courts, however, have considered the defendant's interest in securing release from unjust incarceration in defining the cause test even though the justice of continued confinement does not logically speak to the causes of a procedural default.[179] Their decisions find precedent in two Rule 12 cases in which courts found "cause shown" where defendants presented ample evidence of prejudice but provided no explanation for their failure to abide by state procedures.[180]

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[178] See note 169 *supra*.

[179] Rinehart v. Brewer, 561 F.2d 126, 130 n.6 (8th Cir. 1977); United States v. Underwood, 440 F. Supp. 449, 502 (D.R.I. 1977).

[180] In United States v. Wasson, 568 F.2d 1214 (5th Cir. 1978), the court vindicated a defendant's claim that she was prejudiced by joinder of her trial for possession of stolen property with co-defendants, even though the defendant gave no explanation for failing to ask for a severance prior to or during trial: "Under the circumstances of this case, co-defendant Littrel brought to the trial court's attention the possibility of prejudice by his motion for severance and the trial court denied that motion as it would have Wasson's. Because the trial court has a continuing duty to be on the lookout for possible prejudice, and the jury's

In fact, a survey of the early cases analyzing what attorney conduct constitutes cause suggests that courts define cause expansively when they confront the possibility of "unjust incarceration," but define cause more narrowly when a habeas petition does not appeal to their sense of justice. Although it is difficult to define precisely the term "unjust incarceration," courts have found constitutionally effective attorney conduct to be cause in cases involving violations of due process under *Mullaney v. Wilbur*,[181] the deprivation of the right to an impartial jury,[182] the right to have uncounselled convictions excluded from use at a later trial,[183] the due process assertion that, as a matter of state law, the petitioner is innocent,[184] and the violation of due process by the introduction of inculpatory statements made to an examining psychiatrist.[185] Courts apparently have defined cause more narrowly when the petitioner has not shown either actual prejudice[186] or the existence of a constitutional violation,[187] or when he has asserted the violation of a non-truth-furthering right.[188]

If the existence of possible injustice influences the showing necessary to establish cause, then it may be deceptive to view the cause-and-

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verdict in this case made the existence of actual prejudice apparent, we find that in the interests of justice, Wasson's judgment of conviction should be reversed and her case remanded for a new trial." *Id.* at 1223. *See also* United States v. Shackleford, 180 F. Supp. 857 (S.D.N.Y. 1957) (where an indictment was duplicitous by charging more than one crime in the same count, and the defendant would be prejudiced by the duplicity, the court found no waiver even though the defendant failed to raise the duplicity issue before trial). *See generally* Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950) (in a trial for World War II treason, the court reached the merits of two claims without finding cause for failure to raise the claims at trial).

[181] *See* Graham v. Maryland, 454 F. Supp. 643 (D. Md. 1978); Cole v. Stevenson, 447 F. Supp. 1268 (E.D.N.C. 1978). *See also* Robertson v. Collins, Civ. No. Y-78-1544, slip op. at 9, 15 (D. Md. Feb. 23, 1979) (cause defined expansively where petitioner failed to bring a *Mullaney v. Wilbur* claim because "[t]he full implication of *Winship* was not and could not have been apparent . . . at the time of [the petitioner's] trial," even though petitioner failed to establish actual prejudice because of the substantial evidence of his guilt).

[182] *See* Bromwell v. Williams, 445 F. Supp. 106 (D. Md. 1977).

[183] *See* Farrow v. United States, 580 F.2d 1339 (9th Cir. 1978) (en banc).

[184] *See* Canary v. Bland, 583 F.2d 887 (6th Cir. 1978) (Merrit, J., concurring) (appellant innocent of charge of being a habitual offender because an earlier conviction violated due process and thus became unavailable for late enhancement purposes).

[185] Collins v. Auger, 577 F.2d 1107 (1978), *cert. denied*, 47 U.S.L.W. 3497 (U.S. Jan. 22, 1979).

[186] *See* Arnold v. Wainwright, 516 F.2d 964 (5th Cir. 1975). *But see* Robertson v. Collins, Civ. No. Y-78-1544 (D. Md. Feb. 23, 1979); note 181 *supra*.

[187] *See* Brawer v. United States, No. 78 Civ. 3513 (S.D.N.Y. Dec. 14, 1978); Porter v. Leeke, 457 F. Supp. 253 (D.S.C. 1978); Ramsey v. United States, 448 F. Supp. 1264 (N.D. Ill. 1978).

[188] *See* Gates v. Henderson, 568 F.2d 830, 840 (2d Cir. 1977) (en banc) (Oakes, J., concurring); United States v. Underwood, 440 F. Supp. 499 (D.R.I. 1977).

prejudice test as two independent inquiries. Justice Stevens' evaluation in *Sykes* of the cause-and-prejudice test suggests this conclusion:

> The notion that a client must always consent to a tactical decision not to assert a constitutional objection to a proffer of evidence has always seemed unrealistic to me. Conversely, if the constitutional issue is sufficiently grave, even an express waiver by the defendant may sometimes be excused. Matters such as the competence of counsel, the procedural context in which the asserted waiver occurred, the character of the constitutional right at stake and the overall fairness of the proceeding, may be more significant than the language of the test the Court purports to apply.[189]

The cases collected by Justice Stevens[190] to demonstrate the operation of *Fay*'s deliberate by-pass standard illustrate the same point. Courts have been willing to hold that failure to raise a claim constitutes deliberate by-pass where the habeas petitioner has not been harmed by the error,[191] but have not been willing to preclude habeas corpus relief when the conviction rests on the basis of an illegal search,[192] or when the attorney made a tactical, but constitutionally incorrect, decision not to allege that a confession had been coerced.[193]

Notwithstanding the relevant Supreme Court language, the federal courts appear to be employing a variable cause standard that shifts as the courts weigh the defendant's interest in securing relief from unjust incarceration, the state's interest in finality, judicial efficiency and federalism, and the needs of the adversary system. In so doing, the courts have perhaps reverted to the original use of the term "cause shown" provided by the Court in *Shotwell*.[194] "It is entirely proper," the *Shotwell* Court instructed, "to take the absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of [Rule 12]."[195] Use of a cause standard that considers the possibility of unjust incarceration explains why it is difficult, if not impossible, to predict whether a particular type of attorney conduct always will, or always will not, constitute cause. Although such results appear inconsistent when measured against any definition of cause that only looks to the reasonableness of the petitioner's explanation for failure to abide by a state rule, they may be entirely consistent with the balancing process that is involved in weighing the defendant's interest, the state's interest, and the needs of the adversary system. The results may also be consistent with the assurance of the court in *Sykes* that the application of the cause-and-prejudice test would not result in "a miscarriage of justice."[196]

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[189] Wainwright v. Sykes, 433 U.S. 72, 94-96 (1977) (Stevens, J., concurring) (footnotes omitted).

[190] *Id.* at 94 n.1 (Stevens, J., concurring).

[191] In Whitney v. United States, 513 F.2d 326 (8th Cir. 1974), the court found that trial counsel conceded the validity of a consent search later challenged by a writ of habeas corpus and that counsel "could have believed that if they unsuccessfully objected to the searches at trial, they would have been admitting a possessory interest in the searched premises where the contraband was found." *Id.* at 329. The court in United States v. Henderson, 462 F.2d 1125, 1129 (2d Cir. 1972), found that "it was the deliberate and consistent strategy of Terry's counsel at his state murder trial not only not to question the voluntariness of his confession but to use it affirmatively to support Terry's testimony of lack of any premeditated intent to kill." In United States v. Rundle, 429 F.2d 791, 795 (3rd Cir. 1970), the court found that defense counsel did not object to the introduction of an allegedly coerced confession "because they had concluded that the statement was admissible. This conclusion was no doubt based in some measure on Broaddus' statement to his lawyers that he 'voluntarily gave information.' "

[192] *See* Frazier v. Roberts, 441 F.2d 1224, 1229 (8th Cir. 1971) (in its petition for rehearing the state admitted that "the search warrants authorizing the searches . . . were invalid, that the evidence obtained by those searches should have been suppressed, and that without the unlawfully obtained evidence appellant could not have been convicted.").

[193] *See* Moreno v. Beto, 415 F.2d 154, 157 (5th Cir. 1969) ("A waiver could not result from a deliberate choice of trial strategy based on an unwillingness to expose appellant to the existent Texas procedure not then known to be unconstitutional" under Jackson v. Denno, 378 U.S. 368 (1964)).

Conclusion

In *Wainwright v. Sykes*, the Supreme Court promulgated a new waiver standard to govern the procedural default of a habeas petitioner's *Miranda* claim. The Court's cause-and-prejudice test thus displaces, at least for certain claims, the deliberate by-pass standard adopted earlier by the Supreme Court in *Fay v. Noia*. Although the *Sykes* Court applied the cause-and-prejudice test to the facts before it, the Court did not elucidate the showing necessary to establish either actual prejudice arising from a constitutional violation or cause for failure to raise a constitutional claim in accordance with state procedure.

A survey of the lower federal court cases applying the cause-and-prejudice standard discloses substantial conflict in the definition and application of those terms. The vast majority of courts defining actual prejudice have used a variant of harmless-error analysis. One court, however, has explicitly rejected the harmless-error approach and has embraced the more rigorous "colorable showing of innocence" requirement. Still other courts have found actual prejudice in cases involving claims that may be viewed either as truth-furthering rights or as per se harmful error.

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[194] See text accompanying notes 17-19 *supra*.

[195] 371 U.S. 341, 363 (1963).

[196] 433 U.S. at 91.

Virtually all of the discussion of the meaning of cause has centered on what, if any, attorney conduct will provide a habeas petitioner with a reasonable and valid explanation for his failure to abide by a procedural rule. Although courts have generally agreed that constitutionally ineffective assistance of counsel constitutes cause, they have split sharply over whether cause is shown in cases involving attorney conduct that is in some sense "excusable" (either because the attorney acted negligently or because he failed to raise a claim no attorney would have raised) or that is, in fact, nonstrategic. The cases may be more consistent than they appear, however, because the courts that read cause expansively have generally been confronted with facts that suggest the possibility of unjust incarceration. Even though unjust incarceration does not provide an explanation for failure to raise a claim, courts may be more sympathetic to petitioners who, but for the presence of the cause requirement, could vindicate their innocence.

In sum, promulgation of the *Sykes* cause-and-prejudice test has engendered considerable confusion and inconsistency among the lower federal courts. Although the contours of the shift in policy from *Fay v. Noia* to *Sykes* are clear, many of the details are not. In grappling with the unresolved issues after *Sykes*, the lower federal courts have created a substantial body of law that, while often contradictory, presents the alternatives available to the Supreme Court in completing the design of which *Sykes* is only one step.

THE STATE COURTS AND FEDERAL CONSTITUTIONAL LITIGATION

Paul M. Bator*

I.

I am honored to participate in this symposium, and particularly pleased to do so in this remarkable place. In Williamsburg the sense of history merges creatively with the contemporary in the important work of teaching, research, and law reform carried on at the Marshall-Wythe School of Law at William and Mary and at the National Center for State Courts.

We are gathered here to discuss "State Courts and Federalism in the 1980's." The subject I wish to consider is the role of the state courts in the elaboration of *federal* constitutional law and the enforcement of *federal* constitutional principles. I lay stress on the word "federal" to emphasize that my subject, and my perspective, diverge sharply from the discussions which have recently focused on the possible use of *state* constitutional provisions to guarantee rights which the United States Supreme Court has found not to be contained in the Federal Constitution.[1] My focus is on state courts

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[1] *See, e.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 873 (1976). It is an important feature of these discussions that, if a state court finds that its state constitution extends greater protection to its citizens against state action than does the Federal Constitution, the state court judgment is normally immune from Supreme Court review because it rests on an independent and adequate state-law ground. (I say "normally" because there are some cases in which a substantial and independent federal question can be raised with respect to the validity of the protection-extending decision of the state court. *See, e.g.*, PruneYard Shopping Center v. Robins, 100 S. Ct. 2035 (1980). Usually, however, such a state court holding—for instance, a holding that the state constitution, unlike the federal, *absolutely* prohibits the state from imposing the death penalty—would not be subject to Supreme Court review.) Those who regard the current Supreme Court as too grudging in its protection of individual rights thus see the state courts as constituting an alternative forum for vindicating such rights, a forum which, in this context, has the great advantage of not being subject to Supreme Court supervision. *See, e.g.*, Lewin, *Avoiding the Supreme Court*, N.Y. Times, Oct. 17, 1976, § 6 (Magazine), at

as pronouncers of federal constitutional law—a role in which they are of course subject to Supreme Court review. The question I seek to raise is this: why do the state courts have a role here at all? Why should we look to the state courts to continue to participate in the enterprise of defining and enforcing federal constitutional principles?

You may consider these questions to be naive and even a bit peculiar. The participation of the state courts in the formulation and application of federal constitutional principles is, after all, the explicit premise of the supremacy clause,[2] and has been deeply engrained in our institutional structures since the beginning.[3] Its legitimacy and desirability are buttressed by an enormous tradition of federalistic rhetoric, running in an unbroken line from the *Federalist Papers*[4] down to today's Supreme Court opinions.[5] We might use as the signature phrase of this rhetorical tradition the ubiquitously quoted lines of the first Justice Harlan in *Robb v. Connolly:* "Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ."[6]

31.

I must confess to some misgivings about the extent to which some of this commentary seems to assume that state constitutional law is simply "available" to be manipulated to negate Supreme Court decisions which are deemed unsatisfactory. And I regard it as inappropriate for Supreme Court Justices themselves to campaign to enact into unreviewable state constitutional law dissenting views about federal constitutional law which have been duly rejected by the United States Supreme Court. See, for an example of a not at all subtle invitation of this sort, Michigan v. Mosley, 423 U.S. 96, 120-21 (1975) (Brennan, J., dissenting).

[2] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." U.S. CONST. art. VI, cl. 2.

[3] It is a commonplace known to every student of federal jurisdiction that from the very first judiciary act until today the state courts have had either exclusive or concurrent original jurisdiction over an enormous body of federal-question litigation. See generally BATOR, MISHKIN, SHAPIRO & WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM ch. VII, sec. 2 (2d ed. 1973 & Supp. 1981) [hereinafter cited as HART & WECHSLER and HART & WECHSLER 1981 SUPP., respectively], for the statutory and case materials showing the gradual development of the lower federal courts' federal-question jurisdiction, a development which did not even begin seriously until 1875.

[4] *See* THE FEDERALIST No. 82 (Hamilton).

[5] *See, e.g.*, Allen v. McCurry, 101 S. Ct. 411, 419-20 (1980).

[6] 111 U.S. 624, 637 (1884).

But is this true? I do mean to raise the question in the most deliberately naive way I can. I want to do so because there is another rhetorical tradition, running directly to the contrary. It asserts that, since the adoption of the Civil War amendments and the post-War civil rights and jurisdictional statutes, the task of formulating and enforcing federal constitutional principles should in increasing measure be regarded as the task of the federal, rather than the state, courts. The federal courts are to be preferred because, we are told, federal judges are more competent and expert in adjudicating issues of federal law; are more independent in resisting popular and political pressures; and are likely, through institutional perspective, to be more sensitive to claims of federal right and more zealous and even conscientious in upholding them against assertions of state power, than are state judges.[7] The signature phrase of this rhetorical tradition is the line from Frankfurter and Landis' classic work, *The Business of the Supreme Court*, characterizing the lower federal courts as "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."[8] Its logical culmination was best expressed, however, in a remark I once heard from my distinguished colleague, Charles Alan Wright: federal courts should adjudicate issues of federal law; state courts should adjudicate issues of state law.[9]

And, indeed, why not? The argument that parity is a myth,[10] that the federal courts are a preferable forum for vindicating federal constitutional interests, surely cannot be dismissed as insubstantial. Why should we bother to resist it? Why should we continue to try to tailor our jurisdictional rules so as to preserve a role for the state courts in federal constitutional litigation? Why should we continue to have exhaustion rules and forfeiture rules and equitable restraint rules and res judicata rules, whose cumulative purpose is to channel the adjudication of federal questions into the state courts? There are, of course, the conventional arguments for federalism, the arguments about the benefits of dispersing powers and of having multiple laboratories of social experimentation. But the applicability of these "decentralization" arguments to our question—the proper role of state judges in deciding issues of *federal* law—seems, at least at first glance, doubtful. These arguments may tell us that some matters should be subject to state, rather than federal, regulation and therefore governed by state, rather than federal, law; but they do not in any obvious way tell us that, once we have decided that an issue is to be governed by federal law, the task of pronouncing it should be assigned to the state courts.

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[7] In recent years the most forceful articulator of the rhetorical tradition I refer to has been Justice Brennan, particularly in his opinions (both for the Court and in dissent) on the scope of habeas corpus and on the proper limits of the *Younger* doctrine. The best summary of the functional arguments in favor of federal-court superiority is Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

[8] FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (1927).

[9] I should emphasize that the context of the remark was a discussion of federal diversity jurisdiction; its thrust was therefore that federal courts should get out of the business of adjudicating cases arising under state law, rather than the converse.

[10] The phrase comes from the title of Professor Neuborne's article, *supra* note 7.

And, anyway, there remains the naive question: are these arguments valid?

II.

I want to start my analysis by persuading you that it is critically misleading to think about our question in the abstract, apart from its setting in specific contexts of institutional design. Most arguments comparing federal and state courts as forums for litigating federal constitutional issues seem to focus on whether a plaintiff with a federal claim should be allowed to take it to a federal court or be forced to go to state court. In that context, once it is established that the federal court may, on balance, do a better job, the argument that a plaintiff should be free to choose the federal forum seems especially powerful.[11]

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[11] Indeed, an alternative form of the argument in this context asserts that we needn't decide whether the "better" forum is the federal or state court; if the plaintiff is allowed to choose, the two court systems will "compete" in offering juster justice and the resulting "market" will determine which is "better."

Note that there are some problems even within the structure of this argument. Why should it be the *plaintiff's* choice which is decisive? What about the preference of the *defendant*? (The latter preference would be honored if we allowed the defendant to remove cases from state to federal and from federal to state court. On the other hand, if we wanted to honor consumers' preferences and were prepared to treat plaintiffs and defendants equally, some kind of auction system would have to be devised.) The argument simply assumes that the forum the plaintiff is likely to choose—that is, the more pro-plaintiff forum—is also the "preferable" forum from some neutral or "constitutional" perspective. It is

But that is not the only, not even the typical, context. Many of the federal claims we are concerned with are claims that the Constitution prohibits or limits the exercise of official state power. And the great, the insuperable difficulty is that the institution asked to enforce state law and state policy will often be the state court. The criminal law is of course the paradigm example: criminal sanctions imposed by state law will not—may not—be effectuated without resort to a court to render judgment. But the point is wider: when the state government seeks to tax or to regulate, to prohibit or to require, it will frequently find it desirable to go to court to do so. Indeed, if coercion is involved, it usually must do so. For we should remember that the use of courts, including state courts, as enforcement tools is a benign, not a malign, aspect of our legal system—one that is probably required by the Federal Constitution itself. It exemplifies the principle that, at least when the government seeks to coerce the citizen, judicial process is part of due process.[12]

But note that, for our question, the use of state courts as tools of enforcement is a source of critical complications. For the federal claim must now be that the Constitution forbids or limits the application of official power being asserted or about to be asserted *in a state court*. The question is not whether a plaintiff should be directed into a state or federal court; we have a defendant or prospective defendant on our hands, in a state proceeding which will happen in any event unless we do something about it. The federal claim is, in turn, logically relevant to and potentially decisive of the outcome of that state court action: the argument will be that the state court may not convict me, or admit this evidence against me,[13] or order me to comply with this regulation or pay this tax,

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based, I believe, on the premise that in these cases the plaintiff represents "the Constitution" in a sense that the defendant doesn't. I discuss that premise later in this paper. *See* pp. 632-33 *infra*.

[12] I say "at least" because the constitutional right to judicial review may extend beyond cases of government coercion. See generally Hart & Wechsler 330-60; and see the materials in Breyer & Stewart, Administrative Law and Regulatory Policy 891-921 (1979).

[13] A federal claim of this sort (for example, that evidence cannot be admitted) presents a somewhat special case because, even if upheld, it does not necessarily end the state court enforcement proceeding. For purposes of this essay, however, such a "partial" federal defense presents no special analytical problems and thus can be assimilated to "complete" federal defenses. When I refer, therefore, to federal defenses which would have the effect of "aborting" the state enforcement proceeding, I mean to include the case where the proceed-

because the Federal Constitution prohibits it. The state court cannot decide the case and authorize enforcement *without* considering the federal claim, unless of course we are prepared to repeal the supremacy clause and overrule *Marbury v. Madison.*[14]

Now, then, what are we to do if we decide that, because of their superior competence or other reasons, we want federal rather than state courts to adjudicate this federal claim? I submit that we have only three ways to "enact" such a decision: (1) We can remove the entire enforcement proceeding to federal court. (2) We can allow the entire proceeding, including the federal claim, to be adjudicated in the state court, and then allow the federal issue to be *re*-litigated in a collateral federal proceeding. (3) Finally, we can carve out the federal defense and try it separately in a federal court, presumably in an injunctive or declaratory proceeding, with the effect of aborting the enforcement proceeding if the federal claim is sustained.[15]

Each of these devices is, of course, in current use in some cases. But what I wish to stress here is that the issues of comparative competence must at least in part be addressed in the institutional context of these devices.[16] The question is not, *tout court,* whether

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ing would be affected but not necessarily ended if the federal claim is upheld.

[14] 5 U.S. (1 Cranch) 137 (1803). The point was clearly perceived by Justice Story in his famous opinion in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 341-42 (1816), in which he pointed out that it is inevitable that many contentions based on federal law would come up by way of defense or replication in cases arising purely under state law.

[15] One can conceive of a variety of "mixed" cases and of shifts in nomenclature. For instance, a defendant could be permitted to "remove," not the entire case, but merely the federal defense, for separate trial in the federal court. But this would be the functional equivalent of a separate injunctive or declaratory action, and thus does not require separate analytical treatment. My submission is that, analytically, these are the three major modes through which a federal court could address a federal question relevant by way of defense to a state court enforcement proceeding.

Another point should be made for analytical clarity. There are federal constitutional claims whose very content is that a state enforcement court has exercised power in a manner inconsistent with the Federal Constitution. A paradigm example would be the federal constitutional right, recognized in Jackson v. Virginia, 443 U.S. 307 (1979), not to be convicted in a state criminal proceeding unless the evidence supports a finding of guilt beyond a reasonable doubt. Here we have a federal constitutional question which cannot be "carved out" of the state enforcement proceeding; it is a question with respect to that very proceeding. If it is to be addressed by a federal court, it must be addressed either on appeal or by way of collateral attack.

[16] I am of course not asserting that the question of comparative competence arises only in the context of these devices. There are enormous and important categories of cases where

federal and state courts stand in parity. The question is whether a preference for the federal forum justifies removing to federal court all state court enforcement proceedings in which a federal question is raised; or justifies relitigating all federal questions already adjudicated in the state courts; or justifies separate federal litigation of all federal defenses in injunctive or declaratory actions in the face of pending or impending state court enforcement proceedings.[17]

III.

It is my submission that the question whether there is any basis for resisting claims in favor of a federal forum takes on a new aspect when considered in the context of these institutional devices. Let us glance briefly at each of them.

A.

Removal need not detain us long. The notion that all state criminal and civil enforcement proceedings should be automatically removable whenever a federal constitutional claim is raised by way of defense strikes me as obviously unacceptable, a classical cage of wagging a huge shaggy dog by a slender tail. Such a scheme would impose a large and unnecessary burden on the federal courts by implicating them centrally in the task of enforcing state criminal and administrative regulation, even in cases where the federal constitutional issue is but a minor and separable feature of the controversy. It would gratuitously buy us a whole new host of Erie problems. It would constitute a gross interference with the power of the states to design their own institutional schemes for enforcing

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there is no state court enforcement proceeding under way or in the wings, and the question really is the one conventionally addressed: should the plaintiff have to go to state court, or to federal court, or have a choice? That in fact is the case in most ordinary federal-question cases where the plaintiff is suing to enforce an ordinary federal cause of action, one which does not impinge on a state court enforcement action.

My paper does not deal with the question of what criteria should govern the allocation of such cases to state or federal court. I address, at least directly, only one narrow (but, I hope, significant) phenomenon: cases where state enforcement courts must and will adjudicate federal constitutional defenses unless some affirmative intervention occurs to "reroute" the federal question into a federal district court.

[17] I use the word "all" with respect to my three procedural contexts because the proposition I seek to test is whether state courts have *any* role to play in adjudicating federal constitutional questions.

state law and policy. It is, therefore, not only not surprising but, I submit, virtually inevitable that Congress has been historically reluctant to provide for federal defense removal and that the Supreme Court has rejected attempts to persuade it to interpret the Civil Rights Removal Act[18] to accord defendants a virtually automatic right to abort, by removal, state court civil and criminal enforcement proceedings involving a federal constitutional defense.[19]

B.

Collateral relitigation of federal constitutional issues already adjudicated in the state courts is, of course, what we do on habeas corpus, when the state enforcement proceeding is a criminal prosecution ending in detention and the constitutional issue is cognizable on habeas under the rule of *Brown v. Allen.*[20] Fourth amendment (and perhaps other) claims may also be relitigated on habeas corpus under *Stone v. Powell,* but only on a showing that the petitioner did not have a full and fair opportunity to have that claim considered in the state courts.[21] Note, however, that there are rules of exhaustion and rules of waiver/forfeiture—rules which coexist with both *Brown* and *Stone*—which do create pressures to allow the state courts to consider the federal claim initially, even though the consideration may be nondispositive.[22]

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[18] 28 U.S.C. § 1443 (1976).

[19] Materials with regard to the development and present structure of the federal courts' removal jurisdiction are gathered in chapter VIII, section 4 of Hart & Wechsler and Hart & Wechsler 1981 Supp. Federal defense removal is not generally permitted in civil or criminal cases. Federal officers may usually remove state court enforcement actions against them, *see* 28 U.S.C. § 1442 (1976), and federal defense removal is under certain circumstances permitted by the Civil Rights Removal Act, 28 U.S.C. § 1443 (1976). The cases interpreting that Act, referred to in the text, are Georgia v. Rachel, 384 U.S. 780 (1966), and City of Greenwood v. Peacock, 384 U.S. 808 (1966), rejecting the position urged in Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial,* 113 U. Pa. L. Rev. 793 (1965). In *Peacock,* the Court said:

> Has the historic practice of holding state criminal trials in state courts . . . been such a failure that the relationship of the state and federal courts should now be revolutionized? Will increased responsibility of the state courts in the area of federal civil rights be promoted and encouraged by denying those courts any power at all to exercise that responsibility?

384 U.S. at 834. *See also* Johnson v. Mississippi, 421 U.S. 213 (1975).

The American Law Institute, in its *Study of the Division of Jurisdiction Between State and Federal Courts* (1969), proposed that federal defense removal should normally be permitted in civil cases. *See* § 1312. State and local government enforcement actions were, however, specifically excluded from the proposal. *Id.* § 1312(b)(6).

[20] 344 U.S. 443 (1953).

[21] 428 U.S. 465 (1976). The Court subsequently held the rule of *Brown v. Allen* (rather than that of *Stone v. Powell*) applicable to the claim that there was racial discrimination in

This is obviously not the place to rehearse in detail the well known and voluminous controversies surrounding federal habeas corpus for state prisoners and the rule of *Brown v. Allen*.[23] (Some of you may know that I participated in those controversies with a long article in 1963—an article which has had the strange history of being pronounced dead almost as soon as it was written, only to enjoy a mysterious recent resurrection.[24]) What is relevant now is this. There are, obviously, impressive arguments in favor of the collateral relitigation model, particularly in the context of the criminal law.[25] I should note that a stimulating and ingenious addi-

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the selection of a grand jury, Rose v. Mitchell, 443 U.S. 545 (1979), and to the claim that the evidence did not support a finding of guilt beyond a reasonable doubt, Jackson v. Virginia, 443 U.S. 307 (1979). See further Hart & Wechsler 1981 Supp. 388-95.

[22] See generally Hart & Wechsler 1481-94 and Hart & Wechsler 1981 Supp. 395-414, for materials on the question of when a failure to raise a federal constitutional issue in a state criminal proceeding will lead to a forfeiture of the right to raise it on federal habeas corpus, and the (distinct) question of when a prisoner is required to exhaust state court remedies before resorting to federal habeas corpus.

[23] Citations to the literature are collected in chapter X of Hart & Wechsler and Hart & Wechsler 1981 Supp.

[24] Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963) (espousing views rejected a few months later in Fay v. Noia, 372 U.S. 391 (1963)). See further Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring); Stone v. Powell, 428 U.S. 465 (1976).

[25] It is in the context of the criminal law that we most prize the value of "reliability" in judicial proceedings; and, as is stressed by Professor Cover in his contribution to this Symposium, see Cover, *Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, pp. 639-82 *infra*, habeas corpus, by affording an additional ("redundant") inquiry, reduces the chances that an innocent person will be convicted of crime. (Of course, in the context of the criminal law, this is not quite the same as saying that redundancy increases over-all accuracy, since no provision is made for correcting the reverse mistake, that is, the acquittal of the guilty. Our system of criminal appeals and collateral reviews is designed to increase reliability on a one-way ratchet. What this system does to *over-all* accuracy is unknown.)

In my own article on habeas corpus I explored some of the epistemological problems inherent in trying to establish the "real" truth through repeated inquiry. Bator, *supra* note 24, at 444-53. However, I, too, stressed that the task of assuring that innocent persons are not convicted constitutes a major justification for collateral review of criminal convictions, and suggested that the federal habeas corpus jurisdiction might be reoriented to focus with somewhat more precision on that task. *Id.* at 508-09, 525-28. See also Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970). These themes were in turn made the subject of attention in Stone v. Powell, 428 U.S. 465 (1976).

tion to these arguments was made in 1977 by Professor Cover and Mr. Aleinikoff, in an article in the *Yale Law Journal*, stressing that the redundancy entailed by the habeas model has the virtue of producing a creative dialogue between the state courts and the lower federal courts in the development of federal constitutional principles.[26]

On the other hand, it is equally obvious that the case the other way is not frivolous either. The automatic collateral relitigation model exacts severe costs. It is profligate with resources at a time of increasing scarcity, and profligate in the service of a remedial enterprise whose contribution to the fair administration of criminal justice is itself beset by doubts.[27] By denying finality to criminal convictions, it tends to undermine the deterrent and rehabilitative functions of the criminal law. It creates a peculiarly abrasive and intrusive relationship between the federal and state courts, since it subordinates the entire hierarchy of state tribunals to a single federal district judge[28] even in cases where there is no show-

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Jackson v. Virginia, 443 U.S. 307 (1979), presents a particularly testing context for assessing the extent to which the value of "accuracy" justifies repetitious inquiry. Its rule, giving state prisoners an opportunity to have a federal habeas corpus court review the sufficiency of the evidence to convict, has the attractive quality that it focuses attention on the most fundamental question of substantive justice: was the defendant guilty? On the other hand, Justice Stevens makes a powerful demonstration in his dissent that the case creates an unnecessary, disruptive, and demoralizing system of redundant review with respect to issues which are adequately and conscientiously handled by the state courts.

[26] Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977). To minimize redundancy, I will hereafter refer to this article as one by Cover.

[27] The doubts are primarily a product of the fact that habeas jurisdiction generates an enormous caseload but very few cases where it is eventually found that the detention was unlawful. (The latest empirical study of habeas corpus, including the "success rate," is reported in ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS (Office For Improvements in the Administration of Justice, U.S. Dep't of Justice 1979). See also the pioneering study by Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973).

A difficulty with the argument that redundancy increases accuracy is that it does not suggest a method for assessing the problem of limits: at what point does the increase in accuracy become so small that it no longer justifies the resources which have to be devoted to the enterprise? This problem is especially acute with respect to a "commodity" such as habeas corpus which constitutes a "free good" for the petitioner.

[28] Of course the judgment of the single federal judge is itself subject to review in a court of appeals. But in the first instance, the single district judge is given the authority to sit in judgment on the decision of the state's supreme court.

ing that the state courts failed to provide a fully hospitable forum for the litigation of the federal claim. And, for reasons I will return to, it may create a counterproductive set of incentives for state judges and legislators.[29]

The point is not that we should eliminate habeas corpus. I do not even argue that we should necessarily narrow the scope of the writ. My submission is, simply, that the disadvantages of redundancy are so obviously substantial that claims of preference for a federal forum expressed in this institutional context will never monopolize the field of argument. As these claims are broadened and generalized, they will inevitably arouse increasing misgivings and, in the end, will generate resistance. Therefore, even in the criminal context, it has long seemed clear to me that there would come to be some reconsideration of the automatic relitigation model of *Brown v. Allen* and the correlative expansive waiver rule of *Fay v. Noia.*[30] Much more important, it has long seemed to me unlikely, even implausible, that we should generalize the rule of *Brown v. Allen* and install it across the board in civil as well as criminal cases. I, for one, was therefore not at all surprised when the Supreme Court recently rejected the invitation, warmly pressed on it by interventionist commentators and already accepted by a number of lower federal courts, to interpret the Civil Rights Act of

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[29] *See* pp. 625-27 *infra.* It should be noted, further, that at least some of the advantages of the collateral relitigation model are obtainable even if the scope of the writ is narrowed to prevent the full-scale automatic redundancy permitted by the rule of *Brown v. Allen.* Thus the creative dialogue celebrated by Professor Cover, *supra* note 26, is not ended even in the fourth amendment area by *Stone v. Powell;* federal district courts will continue to contribute to the formulation of fourth amendment law in cases involving federal criminal prosecutions (as well as in state cases in which it is found that a full and fair opportunity to litigate was not afforded in the state courts). The dialogue does not always have to occur in the very same case.

I might add, too, that the picture of "dialogue" given by Professor Cover seems to me to mute too much the fact that habeas corpus creates not an equal partnership but a hierarchical structure; in the case at hand it is the opinion of the federal court which always "counts." The extent to which this institutional structure subordinates the state to the federal courts is only somewhat relieved, it seems to me, by a factor stressed by Professor Cover, namely, that the opinions of the lower federal courts in habeas corpus cases are not necessarily authoritative in subsequent state criminal cases.

[30] 372 U.S. 391 (1963). *Fay v. Noia* has been substantially eroded by Francis v. Henderson, 425 U.S. 536 (1976), and Wainwright v. Sykes, 433 U.S. 72 (1977). See generally HART & WECHSLER 1981 SUPP. 411-13.

1871, 42 U.S.C. § 1983,[31] as authorizing the federal courts, notwithstanding the contrary command of the Full Faith and Credit Act,[32] to deny res judicata effect to state court decisions of federal constitutional law. I agree with the Court's recent decision in *Allen v. McCurry*,[33] holding that collateral estoppel prevents the use of section 1983 to reconsider a fourth amendment issue which had been fully and fairly litigated in a suppression hearing in the state courts.[34] More to the point, it has seemed to me inevitable that, given the major doubts surrounding the use of habeas corpus as a device for automatic federal relitigation, some limits on its further expansion as a general model for the relationship between state and federal courts would have to be discovered.

C.

I turn now to the third possible device available to us for carrying out a preference in favor of a federal forum. Of the three, it seems to me to be clearly the most elegant and economical. It would allow our state court defendant (or prospective defendant) to carve out his federal contention from the remainder of the lawsuit and reformulate it as an affirmative claim in the federal court. The relief sought can be declaratory or injunctive; the difference between these is not germane to my analysis. In any event the point of the proceeding is to abort any pending or threatened state court proceeding if the federal claim is upheld.[35]

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[31] 42 U.S.C. § 1983 (1976).

[32] 28 U.S.C. § 1738 (1976) provides that state judgments must be given the "same full faith and credit" in the federal courts as would be given in the courts of the rendering state.

[33] 101 S. Ct. 411 (1980).

[34] For background with respect to the questions raised in *Allen v. McCurry*, and for citations to the wide variety of views on those questions, see HART & WECHSLER 1981 SUPP. 243-45. Few of the lower federal court decisions on these problems in fact have suggested that § 1983 allows the same scope for relitigating state court rulings on questions of federal law as is permitted the federal courts when exercising habeas corpus jurisdiction under the rule of *Brown v. Allen*.

[35] I am intentionally vague in the text with respect to the question whether the state proceeding is pending or is merely threatened when the federal action is commenced. There are of course cases asserting that the difference should be decisive in determining whether federal intervention is appropriate. *See, e.g.*, Steffel v. Thompson, 415 U.S. 452 (1974). *But see* Hicks v. Miranda, 422 U.S. 332 (1975). I in fact do not agree with the thesis that federal intervention should be automatically available simply because the federal plaintiff has won a race to the courthouse; a rule which makes everything turn on which case starts first seems

Note that this form of federal intervention—let's call it, somewhat imprecisely, affirmative federal intervention[36]—seems to eliminate some of the most egregious drawbacks of removal or relitigation. Unlike federal-defense removal, it does not necessarily draw into the federal court surrounding issues of state law and policy. Unlike collateral relitigation, it does not have duplication as its central feature. And, in the field of criminal law, federal affirmative intervention has what seems to me to be a major advantage: it provides a mechanism for avoiding the tragedy of having to undergo a criminal prosecution in cases where it is discovered that a valid

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to me wooden and arbitrary. But in the present context I do not have to enter into that question at all, since my only inquiry is whether the arguments against this *sort* of federal intervention are serious enough to create a meaningful counter-tension against claims of superior federal-court competence. I am not, in other words, trying to determine what should be the precise contours of the *Younger* rule.

Analytical clarity does require one further point. It is a disadvantage of the overstated distinction between pending and threatened state proceedings that it obscures a distinction which is truly fundamental: the distinction between cases in which the plaintiff seeks an anticipatory ruling that future conduct is constitutionally immune from state punishment (or other regulation), and cases in which the plaintiff is claiming that past conduct is so immune. In the former case the state enforcement proceeding is by hypothesis not truly "ripe" (although the federal action may be); the violation has not yet occurred, and the whole point of the federal action is to obtain an adjudication of the federal claim without risking punishment (or regulation) even if the claim is rejected.

The important point to note is that there are substantial and interesting arguments in favor of permitting this sort of "true" anticipatory action which are not at all based on claims of superior federal-court competence; they are arguments which would be equally relevant in a unitary nonfederal system. Since I do not deal with these "additional" nonfederalistic arguments—for instance, the argument that anticipatory relief is necessary to avoid the chilling effect of an over-broad statute regulating speech—most of my essay is simply irrelevant to the question whether a federal court should take jurisdiction over these "true" anticipatory actions. The case I use as a focus is the case where a violation of state law has already occurred and the state enforcement action is either pending or at least "in the wings." I focus on that case because it seems to me to present the most testing context for the issue whether *superior federal-court competence as such* should lead us to allow a state court defendant to carve out a federal defense and, as plaintiff, submit it to federal court.

[36] I don't want to call this a "federal anticipatory action," because (as I explained in note 35) I do not mean to canvass the question whether plaintiffs should have access to federal courts to test the validity of state statutes before they have been violated; and in any event, I do mean to discuss the case where the federal action is not "anticipatory" because the state enforcement proceeding started first. "Affirmative federal intervention" is, of course, also too broad, since I mean to focus only on cases where the intervention is with respect to pending or impending state court enforcement proceedings. I hope the qualification can be taken for granted when I use the shorthand phrase.

constitutional defense exists.[37]

In spite of these features, we find yet again that the misgivings aroused by this model of federal intervention have been sufficiently weighty that courts have resisted the tendency to make it automatically available as a matter of right—and have resisted despite the fact that section 1983 seems to stand readily at hand to give it statutory grounding.[38]

What are these misgivings? Note, first, that allowing federal affirmative actions may, in fact, be highly duplicative: although a plaintiff victory in the federal action should normally end the matter, if the federal court rules against the plaintiff the substance of the federal constitutional issue may have to be relitigated in the state court enforcement proceeding.[39]

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[37] This advantage is strongest in the case of the "true" anticipatory action. But it is also relevant to the case where the alleged violation has already occurred and the plaintiff is seeking to avoid prosecution by raising a federal constitutional challenge to the validity of the enforcement proceeding. In that context my argument disputes the traditional equity maxim that it is not irreparable damage to be forced to defend a good-faith prosecution.

Note that this advantage could also be realized if affirmative intervention were available in a *state* court; indeed, many of the arguments in favor of "anticipatory" litigation are quite neutral with respect to the issue of choice between state and federal courts as such. For present purposes, however, I do not question the somewhat rough and ready categorizations of existing law, which force us to choose between an affirmative claim in federal court on the one hand, and an enforcement action in state court on the other. This is the case because, under existing law, if affirmative intervention is otherwise proper, the case may be brought in federal court without inquiring whether an affirmative state court remedy is or is not available. (This is one of the important consequences of Monroe v. Pape, 365 U.S. 167 (1961).)

[38] Even Justice Brennan, the strongest supporter of affirmative federal interventions of this sort on the Court, has not read § 1983 as giving plaintiffs an absolute right to bring such federal claims in federal court. See his opinions in Perez v. Ledesma, 401 U.S. 82, 93 (1971), and Steffel v. Thompson, 415 U.S. 452 (1974), in which he argues that the critical issue is whether the state enforcement proceeding is actually pending when the federal action begins. It is also noteworthy that Justice Brennan's contention that a federal plaintiff has an automatic right to bring a declaratory judgment action if the state prosecution has not yet commenced derives its principle justification not from § 1983 itself, but from a highly iconoclastic reading of the Federal Declaratory Judgment Act of 1934, 28 U.S.C. § 2201 (1976).

[39] A federal ruling against the plaintiff can have preclusive effect in a subsequent prosecution only with respect to those issues which do not have to be submitted to the criminal jury for a finding "beyond a reasonable doubt." If, therefore, the constitutional question in the federal case was not the validity of a state statute on its face, but rather the question whether the plaintiff's conduct is constitutionally punishable (validity "as applied"), the question of what that conduct was would have to be relitigated in the criminal case notwithstanding the federal adjudication. Indeed, I would suppose that the process of applying a

Second, this model of federal intervention loses the elegance it seems to possess in the abstract if the federal constitutional issue is hard to separate from other issues of fact, law, and policy imbedded in the enforcement action. This will often in fact be the case, particularly in disputes involving state administrative schemes. When constitutional issues involve judgments about reasonableness or feasibility, or depend on the assessment of complex economic and social factors, or where the purposes and even the motives of state officials must be assessed in order to resolve them, the question whether the plaintiff has a good federal "defense" cannot be established without passing on the entire case and thus providing, as it were, "total" judicial review. Indeed, there are many cases (including important first amendment cases) in which the federal claim, when analyzed, turns out basically to consist of the contention that the state enforcement proceeding is without justification—a contention which cannot be tested without examining the case for enforcement itself.

It turns out, then, that allowing the federal court to adjudicate in an affirmative proceeding is in some cases the functional equivalent of removal, because it brings to the federal court all of the intertwined issues in the case. Indeed, what sometimes happens, once we have decided to allow such a federal action, is that we then turn around and temporarily abort *it* by ordering abstention and requiring the federal plaintiff to resort to state court first.[40] In such cases—given the initial determination to allow the federal action—we protect the plaintiff's choice of federal forum through the so-called "England reservation," and permit him to return to the federal court after the state court litigation without

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constitutional standard to that conduct would in effect also have to be repeated; a federal ruling that the plaintiff's movie was obscene or his speech a punishable incitement to violence should not preclude a reconsideration of those issues in a subsequent criminal prosecution. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS §§ 68, 68.1 (Tent. Draft No. 1, 1973); Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U.L. REV. 759, 765-66 (1979).

[40] This would be the type of abstention authorized by Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). A plaintiff required to resort to state court under *Pullman* is not free to submit only the state law issues to the state court; the federal constitutional issue must itself be "presented." Government & Civic Employees Organizing Comm., CIO v. Windsor, 353 U.S. 364 (1957).

worrying about res judicata.[41] But note—and it does make one's head spin—that at this point we are back, functionally, at the collateral relitigation model, with all of its disadvantages.

More generally, I think the reluctance to give unlimited license to the federal affirmative action is founded on two separate central intuitions. First, it appears presumptively inefficient and wasteful—even unaesthetic—to carve up what seems like a single controversy between the state and its citizen, and to have two lawsuits, rather than one, devoted to its resolution. It is a deep tradition—and one wholly consistent with the direction of modern procedural reform—to insist that defenses to enforcement proceedings must presumptively be litigated in that proceeding and may not ordinarily be made the basis for independent affirmative actions.[42]

Second, it is obvious that especially sensitive political nerves are likely to be touched if federal judges are free to enjoin—or to declare unconstitutional—state court enforcement proceedings on the basis of claims which could be adjudicated in those proceedings. Historically we have been reluctant to conclude that a generalized preference in favor of the competence and sensitivity of federal judges justifies giving them an automatic right to do so. This reluctance is, of course, exemplified by our ancient anti-injunction statute, 28 U.S.C. § 2283,[43] which prohibits federal court injunctions against state court proceedings. Note further that, although the Supreme Court ruled in *Mitchum v. Foster*[44] that actions under section 1983 are exempt from the bar of section 2283, it did so only after it had already put in place the judge-made doctrine of *Younger v. Harris*,[45] which serves an equivalent functional purpose; *Mitchum v. Foster* had its fangs pulled even before it was announced. And the *Younger* doctrine, itself with antecedents reaching far back into the history of federal equity, centrally reflects the judgment that federal court interference with state court enforcement proceedings represents an extraordinary intervention, to be authorized only if there is a showing that the federal claim cannot be fully and fairly litigated in the enforcement court.[46]

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[41] *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

[42] Note that this presumption applies only to the cases where the violation has already occurred. Where an anticipatory action is brought before the violation has occurred, it should constitute the only proceeding no matter which party prevails. *See* note 35 *supra*.

[43] Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335 (current version at 28 U.S.C. § 2283 (1976)).

[44] 407 U.S. 225 (1972).

[45] 401 U.S. 37 (1971).

IV.

Where are we? My purpose thus far has been narrow and provisional. It is obvious that my arguments do not establish that we should never allow federal defense removal, or federal collateral relitigation, or federal affirmative intervention.[47] Nor do my arguments show that our existing array of rules and doctrines limiting the availability of these devices are sound. I have not shown that *Stone v. Powell* or *Younger v. Harris* were correctly decided, nor that their rules should be extended. All I have tried to show is that there are sufficiently weighty and serious doubts and disadvantages associated with these devices that it is extremely unlikely that anything like automatic or unlimited access to them will, in the foreseeable future, be permitted. Once we see the context, it is clear that claims favoring a federal forum will not and should not exact an unconditional surrender. The federalistic position cannot simply be routed.

It turns out, then, that the question I posed at the outset—why should the state courts continue to participate at all in the enterprise of defining and enforcing federal constitutional principles—is a false question. It is virtually certain that they will continue to participate in the foreseeable future in some form. *They will do so because the institutional costs of the techniques available to put in place the opposite system will inevitably be assessed as too high.*

What we see further is that, although we may disagree with particular results, the Supreme Court, in cases such as *Georgia v.*

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[46] For the antecedents and current contours of the *Younger* doctrine, see the materials collected in Hart & Wechsler 1009-50 and Hart & Wechsler 1981 Supp. 261-86. I appreciate, of course, that there is a line of cases, commencing with *Ex parte* Young, 209 U.S. 123 (1908), and running to Dombrowski v. Pfister, 380 U.S. 479 (1965), which stand in tension with the cases supporting the proposition in the text.

[47] See also notes 68-69 and accompanying text *infra* for a brief discussion of the question of federal *appellate* review of decisions of state courts on issues of federal law.

Rachel[48] and *Younger v. Harris* and *Stone v. Powell* and *Allen v. McCurry*, has at least been playing in the correct ballpark. In interpreting the various remedial and jurisdictional statutes defining the scope of federal intervention by removal or collateral review or affirmative action, the Court has plainly been engaged in the task of finding mediating solutions. It has wandered and wavered, but it has been firm in hewing to one basic principle: neither the federal courts nor the state courts are to be given a monopoly. Both must and will continue to be partners in the task of defining and enforcing federal constitutional principles. The question remains as to where to draw the lines; but line-drawing is the correct enterprise.[49]

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[48] 384 U.S. 780 (1966).

[49] It is the correct enterprise not only because this is institutionally the "correct" or "best" solution, but also because it seems to me to be the proper interpretation of the governing authoritative statutes. One sees, now and again, assertions that some or all of these statutes (particularly the Civil Rights Act of 1871 and the Habeas Corpus Act of 1867) give persons an "absolute" right of access to the federal courts, and that limiting doctrines (such as those announced in *Younger* or *Stone v. Powell*) are therefore illegitimate judicially-imposed limitations on a jurisdiction granted by Congress. See, for example, Stone v. Powell, 428 U.S. 465, 502, 515-33 (1976) (Brennan, J., dissenting). I find unimpressive the methods of statutory construction which lead to these assertions. Statutes such as § 1983 and the Habeas Corpus Act use language which, if woodenly and anachronistically read, can be interpreted to provide an "absolute" right of access to the federal courts. But these statutes were themselves passed against the background of a large body of standing law on matters of substance, remedy, and jurisdiction. As is true of all legislation, it is a major problem of *interpretation* how to fit the new enactment into this preexisting texture. No statute recreates the entire legal universe. The fact that a given remedial doctrine is not explicitly mentioned therefore does not automatically mean that the new statute was intended wholly to supersede it. Thus, to give an example, it seems to me implausible to assume that the cause of action created by and the jurisdiction granted in the Civil Rights Act of 1871 were meant wholly to supersede the preexisting equity doctrine that a good faith criminal prosecution will not ordinarily be enjoined simply because the plaintiff asserts that he has a valid defense to it.

The Supreme Court has, quite correctly, always taken the position that the post-Civil War jurisdictional and remedial statutes, with their generative language and their complex and multifaceted legislative histories, are essentially open-textured, leaving much to interpretation in light of contexts and postulates not always visible on their surface. (See, as an example, the judicial invention of the exhaustion rule in habeas corpus cases in *Ex parte* Royall, 117 U.S. 241 (1886).) Limiting doctrines themselves become part of the legal atmosphere. They may be highly relevant to the "acceptability" of the regime operating under a given statute and therefore to the question whether subsequent Congresses are moved to amend it.

In sum, therefore, it is my submission that, whatever one may think of the *Younger* result, it should not be criticized as an act of judicial usurpation. And *Stone v. Powell* is as

V.

I return to the question of comparative competence—to the question of "parity," which of course continues to be central to the task of deciding where the lines should go.

Let us remind ourselves, briefly, of the arguments put forward to justify the conclusion that the federal courts are the preferred forum. The federal bench constitutes a relatively small elite.[50] Its judges are better paid and have more prestige than state judges; more competent lawyers are, therefore, attracted to the federal bench. That competence is reinforced by the expertise derived from specialization in questions of federal law. Protected by life tenure, federal judges are insulated from majoritarian pressures and will therefore be more receptive to controversial and unpopular constitutional principles. Further, the institutional bias of federal judges will be in favor of federal rights; state judges are more likely to be grudging when local authority is attacked on federal grounds. This sensitivity to federal rights is reinforced by the federal judges' relative insulation from the daily grind of legal administration in our state and municipal lower criminal, family, and civil courts, which is said to breed cynicism and callousness with respect to abstract-sounding constitutional rights.[51]

It is immediately apparent that these contentions are intuitive; they rest on human insight rather than on empirical evidence or scientific measurement. But they surely cannot be dismissed on that account. Indeed, for the moment let's leave aside the question whether, and to what extent, they are true. Assume that we are, more or less, persuaded that the federal forum is, on these grounds, preferable. What should we make of this? What weight should the conclusion have? Is it the case that it should lead us, whenever possible, to draw our lines so as to maximize access to a federal forum?

"legitimate" a contraction of habeas jurisdiction as *Brown v. Allen* was a "legitimate" expansion of it.

[50] There are approximately 650 federal judgeships authorized for the article III courts (not counting senior judges). See Hart & Wechsler 1981 Supp. 5. In California alone there are approximately 1000 *trial* (municipal and superior) court judges. Judicial Council of California, 1980 Judicial Council Report 65, 97.

[51] My account is a pastiche of the splendid statement of the case for superior federal court competence by Professor Neuborne, *supra* note 7.

It is at this point, I submit, that the analysis I have heretofore put before you becomes important. I hope I have persuaded you that, no matter where we draw the line, it is virtually inevitable that the state courts will in fact continue to be asked to play a substantial role in the formulation and application of federal constitutional principles; the arguments in favor of the federal forum will not lead to a monopoly. If this is so, a new problem of fundamental significance emerges: we must try to create conditions to assure optimal performance by the state courts. Since it is given that they will continue to play a role, we might even ask how their performance can be improved. The comparative competence argument tends to assume a static universe. But in creating institutional designs, it is a mistake to think in static terms; the problem is, at least in part, a process problem. It is not enough to assert that the federal forum may be the more hospitable forum; we must also create conditions for assuring that the state courts will become a more hospitable forum, that the rhetoric of parity becomes a reality.

Ideally, we hope that state judges will conceive of the supreme federal law to be part of their own law, not an alien intrusion. We want state judges to think of themselves as really being charged, "*equally* with the courts of the Union," with an obligation to "guard, enforce, and protect every right granted or secured by the Constitution."[52] How can such an attitude be fostered?

I have said before that our assessments of comparative competence and sensitivity in this area are based largely on human intuition. I hope you will allow me, therefore, to lay before you some intuitions of my own. Competence and sensitivity are themselves not static phenomena. Conscientiousness, dedication, idealism, openness, enthusiasm, willingness to listen and to learn—all the mysterious components of the subtle art of judging well—are at least to some extent best evoked by a sense of responsibility, by the realization that one has been entrusted with a great and important task. I can think of nothing more subversive to the judge's inner sense of responsibility than the notion that, to the greatest possible extent, all the important shots will be called by someone else because we don't believe in his or her competence and sensitivity. If we want the state judges to internalize the sense that they, too, speak for the Constitution—that it is *their* Constitution—we must not too easily construct our jurisdictional and remedial rules on the premise that they can't and won't speak for the Constitution. If we want state judges to feel institutional responsibility for vindicating federal rights, it is counterproductive to be grudging in giving them the opportunity to do so.

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[52] The language is that previously quoted from Robb v. Connolly, see text at note 6 *supra*.

Here again, it is critical to remember our various institutional contexts. We are not just talking about whether plaintiffs should have a choice of forum. We are talking, in the case of habeas, about whether we should tell the entire hierarchy of state judges that their judgments about federal rights bearing on the powers of the state will be automatically ignored, not because there has been a showing that the state court adjudication was less than full and fair, but because of a generalized mistrust of the competence and sensitivity of these judges. We are talking, in the case of the injunction action, about whether a state judge should be prohibited from adjudicating a proceeding for the enforcement of state law and policy, not because there has been a showing that federal defenses to the proceeding will not receive a full and fair hearing in the state court, but, again, because of a general mistrust of the competence and sensitivity of state judges.[53] Let us beware of breeding the very attitudes of cynicism and hostility which we fear.

I appreciate that the point I have been making counts as no more than a caution, and should itself be treated with caution. It does not tell us where particular lines should go. It tells us only that we must understand that since the state courts will inevitably continue to be partners in the firm, it is wise to treat them as partners rather than servants.

I turn now to an associated point. Again let me reiterate my starting place: like it or not, the state courts are going to continue to be the forum for the litigation of a substantial body of constitutional issues. The task of creating incentives to assure a hospitable reception to claims of federal right in the state courts will, therefore, continue to be an important task. It is therefore an independent argument in favor of a jurisdictional rule if it can be shown to create such an incentive; whereas it is an argument against a jurisdictional rule if it removes pressure from the state courts to improve their processes for the litigation of federal constitutional issues. In my article on habeas corpus I criticized the rule of *Brown v. Allen* on this ground:

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[53] I stress again that I am not referring here to anticipatory actions to test the validity of statutes before they are violated. See note 35 *supra*. Federal jurisdiction, at least on a concurrent basis, may be justified in such cases on grounds having nothing to do with mistrust of state judges.

> In effect it tells the states that not much will turn on whether or not they provide corrective process: no matter how conscientiously and fairly they apply themselves to the consideration of the merits of federal claims, whether presented at trial or on postconviction process, they will nevertheless automatically be second-guessed by federal district courts as to their conclusions of law and, possibly, factfindings too. . . . I do not, therefore, see the present system as conducive to state procedural reform. It was the "corrective process" doctrine of *Frank v. Mangum* which really created the stimulus for such reform; *Brown v. Allen* has merely blunted that stimulus.[54]

The point holds, of course, in contexts other than habeas corpus as well. And it is striking that this is in fact a uniting theme in many of the recent cases which I have mentioned. What is the common message of *Stone v. Powell* and *Younger v. Harris* and *Allen v. McCurry*? It is that the state court will be allowed to adjudicate, and to do so dispositively, if—but only if—there was or will be a "full and fair opportunity" to litigate the constitutional question in the state court. *Per contra,* if it is shown that the state forum was or will be inhospitable, if corrective process is unavailable in the state court system, then the federal court will step in to adjudicate the federal claim.

In terms of creating a sensible system of incentives, this approach strikes me as fundamentally sound. Of course I appreciate that the "full and fair opportunity" formula leaves untouched the more subtle and invisible aspects of comparative competence.[55] Indeed, it does not purport to be a technique for measuring the state judge's competence and sensitivity at all. If we are fundamentally suspicious of the state court system—if the central problem continues to be the problem of mistrust—then the "full and fair opportunity" formula will not do. I realize, too, that much will turn on the spirit in which the "full and fair opportunity" formula is interpreted in the various specific contexts to which it is relevant.[56] Nevertheless, it is a virtue of this formula that it asks a question about the hospitable nature of the state courts rather than starting with an adverse presumption about it.

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[54] Bator, *supra* note 24, at 523. Although Professor Cover has recently repeated Justice Brennan's assertions to the contrary, see Cover, *supra* note 26, at 1046, I have not as yet heard an argument that persuades me that my reasoning was wrong.

[55] I appreciate, too, that the formula may invite an awkward inquiry that will seem espe-

I can perhaps summarize this branch of my argument with the modest plea that, in deciding what weight is to be given to our current assessment of comparative competence, we think about the long as well as the short run. One can well understand the plea of civil rights plaintiffs' lawyers that they should be allowed access to the federal courts because that is where they will find juster justice. But the plea cannot in itself be decisive to those, legislators and judges, charged with the task of designing and implementing a *system* of remedial and jurisdictional rules. They must think of tomorrow as well as today; they must resist an exclusive fixation on the immediate case.

The importance of creating and maintaining conditions that assure that, in the long run, the state courts will be respected and equal partners with the lower federal courts in the enterprise of formulating and enforcing federal constitutional principles, has an additional weighty aspect. We must never forget that under our constitutional structure it is the state, and not the lower federal, courts that constitute our ultimate guarantee that a usurping legislature and executive cannot strip us of our constitutional rights. The ability of the lower federal courts to vindicate federal constitutional rights is subject to Congress's decision to grant them a jurisdiction to do so. The power of Congress to eliminate the lower

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cially obnoxious to state court judges: an inquiry into the "adequacy" of their court systems and remedial and procedural rules. On the other hand, in a number of contexts (for example, habeas exhaustion; "adequate and independent" state procedural grounds) we have managed to operate with this type of standard without too much difficulty or offense.

[56] An especially sensitive and critical question is the extent to which there will be a meaningful exploration of the adequacy of representation by counsel in determining whether there was a full and fair opportunity to litigate.

federal courts entirely, or to exclude from their jurisdiction some or all categories of cases arising under the Constitution of the United States, cannot be the subject of serious doubt, notwithstanding occasional scholarly and judicial divagations to the contrary.[57] What, then, prevents Congress from turning this power over jurisdiction into a tool for depriving us of our substantive constitutional rights—in particular, the due process right of access to a judicial forum to complain about the illegality of coercive governmental action? As my teacher and colleague, the late Henry Hart, demonstrated almost thirty years ago in his celebrated Dialogue, the answer is this: Congress can validly limit the jurisdiction, or even end the existence, of the lower federal courts; but it cannot control the jurisdiction of the state courts of general jurisdiction so as to foreclose the vindication of a federal constitutional right.[58] The deepest significance of the judical power recognized in *Marbury v. Madison*[59] is, ultimately, not that it permits the lower federal courts to disregard unconstitutional acts of Congress, but that it makes it the duty of the state courts to do so.[60]

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[57] See HART & WECHSLER 1981 SUPP. 103-04, 117, 119-20. An unbroken line of legislative and judicial precedent upholds the clearly expressed plan of the Framers which left it to Congress to determine from time to time whether, and to what extent, access to lower federal courts is needed to assure the effective vindication of a given category of federal rights. The argument that, in light of "changing circumstances," we should override that plan and invent a constitutional right of access to a lower federal court in some or all cases arising under federal law, seems to me to be a classic instance of the "wish is father to the thought" school of constitutional interpretation.

It is of course a commonplace that Congress may not regulate the lower federal courts' jurisdiction so as to violate an independent constitutional rule. (Thus a grant of jurisdiction to the district courts to hear only cases brought by Catholics or whites would be invalid.) But it is a mistake to ooze from that proposition into a reiteration, under a different constitutional rubric (characteristically the due process clause), of the assertion that the right of access to a lower federal court is itself a constitutional right. The due process clause does not guarantee a lower federal court adjudication of a federal claim any more than does article III.

[58] Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

The point is not that any congressional restriction on state court jurisdiction is invalid. (Giving the federal courts exclusive jurisdiction in a given category of federal-question cases would be an example of a valid restriction.) Rather, Congress cannot prevent the state courts from *passing* on the validity of the restriction and from ignoring it if it is invalid. *Whether* it is invalid depends not on article III but on whether the case is one where the due process clause (or some other constitutional provision) guarantees judicial review and, if so, whether there is access to an adequate alternative forum.

[59] 5 U.S. (1 Cranch) 137 (1803).

I am not suggesting that it is part of the foreseeable future that Congress will in fact abolish the lower federal courts or will withdraw their jurisdiction to adjudicate cases arising under the Constitution. I am, however, saying that it is prudent not to put all our eggs in one basket. The state courts do constitute an ultimate protection against tyrannous government. We cannot afford the luxury of proceeding on the assumption that we will never need them. And this adds weight to my previous suggestion: we should devote serious and sustained attention to protecting and improving the conditions which determine whether constitutional claims are hospitably adjudicated in the state courts. This is a more fruitful enterprise than the channeling of more and more cases from the state courts to the federal courts.

VI.

I wish, finally, to make a few comments about the content of the arguments in favor of the superior competence and sensitivity of the federal courts. As I said before, many of these arguments are not implausible just because they are virtually all intuitive. But they do tend to be rather undiscriminating. They work with two undifferentiated categories—all state judges compared to all federal judges. They are, therefore, unable to account for the fact that, as we all know, there are tremendous variations in the quality of the bench from state to state—and, let's remember, in the quality of federal judges too. They also conceal, as I have noted before, that quality is not static. There are many states where it is clear that, in the past ten years, there have been substantial improvements in the receptivity of state judges to federal constitutional claims. What explains these variations? Don't they suggest doubts about the importance of some of the factors commonly assumed to operate?

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[60] Even the most eminent of constitutional authorities can fall into the mistaken habit of asserting that *Marbury v. Madison* was addressed to the powers of the *federal* courts. See, e.g., Tribe, American Constitutional Law 20-23 (1978) ("*Marbury* is the first case in which the Supreme Court asserted that a federal court has power to refuse to give effect to congressional legislation . . . ."; "The Constitution does not expressly confer such a power upon the federal courts."; "Marshall rested his defense of federal judicial review . . . ."). But in fact Marshall's opinion is in no way directed to the question of "federal judicial review" or the powers of "the federal courts." It is directed to the question of the powers and duties of *courts*. (The relevant passage is 5 U.S. (1 Cranch) at 176-80.) And in arguing the "necessity" of judicial review as an incident of the judicial power, he invariably refers to "courts" and "judges," never to "federal" or "national" courts and judges.

The point is, of course, not merely semantic. The justification for judicial review put forward by Marshall has nothing to do, substantively, with the *federal* courts. It is a justification which deals with the questions of what constitutes "law," and what is the courts' obligation to maintain fidelity to "law," in a society with a written constitution.

Further, by lumping all state judges together, these arguments in favor of the superiority of the federal courts obscure another important point. In many cases the proper comparison is not between the federal courts and the state trial courts, but between the federal courts and the entire hierarchy of state courts, including the highest state appellate courts.[61] This is most clearly visible in the case of habeas corpus; *Brown v. Allen* gives the federal district court the power to reconsider federal claims which have normally had a full hearing not only in the state trial court but also in the state appellate system. The point holds for original actions as well. When the federal court takes jurisdiction in an affirmative proceeding and determines a federal claim which could be raised as a defense to a state court enforcement proceeding, the effect is to prevent consideration of that claim by the state appellate as well as the state trial courts.

Does the argument for superior competence hold with respect to state supreme courts? I am doubtful. State supreme court justices as a group are as well paid and have as much prestige as federal judges. Those that I have met seem to me to be as expert on issues of federal constitutional laws as are federal judges. True, many are elected; few have life tenure. But at the state supreme court level, terms tend to be long enough to assure that at least the grosser threats to judicial independence are absent.[62] It seems to me that the case for channeling cases to the federal courts on the ground that sufficiently competent and expert consideration of constitutional issues cannot be expected from the state appellate courts has simply not been made.

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[61] Professor Neuborne's article, *supra* note 7, deserves credit for addressing this point explicitly rather than obscuring it. *Id.* at 1115-16 & n.45, 1118-19. Writing from the perspective of a plaintiffs' lawyer in civil liberties cases, Professor Neuborne naturally emphasizes the "expense, delay and uncertainty," *id.* at 1119, which attends the problem of vindicating federal rights in the state appellate system.

[62] Indeed, in many states the election of state supreme court judges is largely a formality.

The point must be qualified in this respect: the vindication of the federal constitutional right may be blocked by an incompetent or insensitive state trial judge in a way that is invisible on appeal or at least cannot be remedied on appeal.[63] Nevertheless, it is clear that, once the state appellate system is folded into the consideration of the argument, claims for a clear federal superiority become greatly attenuated.

But what about the argument about institutional "set"? If it is true that state judges, just because they are *state* judges, will be less receptive to claims of federal constitutional principles than federal judges, then access to a state supreme court does not cure the problem at all.

I myself have come to doubt the validity—or at least the seriousness—of this argument. The existence of enormous variations among state judges suggests that it does not possess decisive significance. And the argument seems to me to derive primarily from a special historical experience, involving the division of the country on the issue of racial segregation, which is no longer of dominating significance in governing the attitudes of state court judges.

Moreover, there are some interesting and hidden subtleties to be considered in connection with this argument. We are told that federal judges will be more receptive to constitutional values than state judges. What is really meant, however, is that federal judges will be more receptive to *some* constitutional values than state judges. And the hidden assumption of the argument is that the Constitution contains only one or two *sorts* of values: typically, those which protect the individual from the power of the state, and those which assure the superiority of federal to state law.

But the Constitution contains other sorts of values as well. It gives the federal government powers, but also enacts limitations on those powers. *The limitations, too, count as setting forth constitutional values.* Will the federal judge be more sensitive than the state judge in insuring that these limitations are complied with?

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[63] Of course if the matter is so "invisible," it may not be readily apparent to the federal district court either, notwithstanding the *power* of that court to hold a new evidentiary hearing on collateral attack. If the problem of "invisible" errors committed by state trial judges were critical, surely we would *require* trial de novo on habeas corpus.

Whose institutional "set" is likely to make one more sensitive to the values underlying the tenth amendment? Is a federal judge likely to be more receptive than the state judge in honoring other structural principles, such as separation of powers? Why don't these sorts of issues ever seem to count?[64]

More generally, we should note that the semantic repertoire of our constitutional law—we tend to speak of constitutional "claims" and "rights" rather than constitutional "principles" or "rules"—subtly suggests that when a constitutional question arises, constitutional values are represented only by one side or another. One party is said to seek the vindication of the Constitution; the other must therefore be seeking to defeat or subvert it. But the reality is more complex. Even in the sphere of individual rights, it is misleading to suppose that the rejection of a particular constitutional claim imports less fidelity to constitutional values than its vindication. It was Holmes who reminded us that the limits contemplated for the coverage of a statute are as significant a part of its purpose as is its affirmative thrust. When a court upholds a state criminal statute against the claim that it violates the first amendment, it is rejecting one sort of constitutional claim, but it is also upholding principles of separation of powers and federalism which themselves have constitutional status. And, increasingly, cases no longer even present clean-cut confrontations between "individual" and "governmental" interests. (Which side represents "the individual" in a case involving the validity of affirmative action?)

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[64] It is also odd that we do not hear much about problems of "institutional set" in determining what court should pass on claims of individual liberties when these are threatened by the *federal* government. We are accustomed to a deep and complacent bias in favor of the federal judiciary; only such a bias could explain a rule such as the one in Tarble's Case, 80 U.S. (13 Wall.) 397 (1872), which holds that state courts are without competence to pass on the legality of detentions authorized by federal executive officials. Wouldn't it be precisely the state court which would provide a more disinterested and unbiased forum in such a case? Would we not in such a case benefit from an interplay between the state courts, on the one hand, and the United States Supreme Court (which of course would have to continue to have jurisdiction to review the case) on the other? It is true that the federal judges do have life tenure; and that is an insulation. But those with a memory long enough to remember the cruelties inflicted on individuals by the federal government and solemnly legitimized by the Supreme Court in the 1940's and early 1950's know that the insulation provides no guarantee that a virulent pro-government "set" cannot exist. See, for example, Korematsu v. United States, 323 U.S. 214 (1944); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); and Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

Even more striking is that no question is ever raised about the problem of institutional "bias" or "set" when the federal courts deal with the powers of the federal judiciary itself. In defining the range of the federal judicial power, and in giving content to the values expressed by the "case and controversy" rule of article III, *quis custodiet ipsos custodes*?

Finally, what about cases in which the financial interests of the federal judiciary are at stake? In United States v. Will, 101 S. Ct. 471 (1980), the Supreme Court ruled that neither the judges of the lower federal courts nor the Justices of the Supreme Court were disqualified from passing on a case involving the question whether the Constitution invalidated federal statutes revoking previously authorized cost-of-living increases in the salaries of federal judges. Although all these judges and Justices had a direct financial stake in the lawsuit, the Court held disqualification unnecessary because the Rule of Necessity provides that there should not be disqualification if the result is that *no* court can hear the case. *Id.* at 479-81. I am indebted to Professor Cover for pointing out to me the irony of the fact that the Court concluded that the Rule of Necessity obtained in the case without even bothering to *ask* whether a state court might not have been available to consider the case, at least as a matter of original jurisdiction.

Note that I am not making an argument against the centrality of the supremacy clause. But it is worth reminding ourselves that the supremacy clause does not say that the *federal government* shall be supreme. It doesn't even say that the *federal courts* shall be supreme. It says, fundamentally, that the *Constitution* shall be supreme. And the Constitution itself contains a multiplicity of various sorts of values, many in tension with each other: process values as well as substantive values, structural and institutional values as well as those embodying individual rights.

My submission, therefore, is that the claim that cases should be channeled to the federal courts because of the special receptivity of federal judges to constitutional values may embody a narrow and partisan vision of what constitutional values are.[65] And this point

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[65] Indeed, the point has a somewhat broader resonance. One hears much talk, in all sorts of contexts, about what it takes to be a good judge and about what sorts of people should be appointed to the Supreme Court. Sensitivity to constitutional rights is frequently mentioned. Praise is bestowed on *X* and *Y* for their commitment to "first amendment values" or "ideals of equal protection." Such talk should make us uncomfortable, because it often becomes plain that what is sought is not fidelity to the Constitution as a whole, but to one or two favorite parts, like the first amendment or the equal protection clause. (On this view, the fourteenth amendment is seen as representing a constitutional value, except that the same fourteenth amendment's own restriction of its operation to "state action" is regarded as an inconvenient and mysteriously *anti*-constitutional embarrassment, to be parsed as grudgingly as possible! The first amendment is to be hospitably read, but it is perfectly legitimate to read the eleventh out of the document!)

My argument, in sum, is that it is misleading and simplistic to test a judge's fidelity to the Constitution in terms of supposed attitudes toward a narrow checklist of constitutional rules is of fundamental importance to the original question I put: should we try to preserve a role for the *state* courts in formulating and applying principles of *federal* constitutional law? You may remember that at the outset of this lecture I said that conventional federalistic arguments relating to "decentralization" seem inapposite to this issue. But I now ask for your second thoughts. Are they not in fact highly relevant? Do we not derive enormous benefits from having a variety of institutional "sets" within which issues of federal constitutional law are addressed? The creative ferment of experimentation which federalism encourages is *not* irrelevant to the task of constitutional adjudication. And, given this context, it becomes clear that many of the arguments made in favor of the federal forum are, precisely, arguments in favor of partnership, not arguments for a federal monopoly. The elitism of the federal bench, its distance from much of the daily grind of the administration of justice, its specialization—all of these are advantages, but they are disadvantages too. Insight into issues of federal constitutional law should be available from *both* perspectives.

One more speculation remains. The argument that cases should, as much as possible, be directed toward the federal courts seems to me to embody, at a deep level, what might be called the positivist reflex, one which conceives of lawmaking in hierarchical terms and sees fidelity to law primarily as a matter of complying with pronouncements coming from a higher authority. The moral task is, fundamentally, the duty to obey. On this view, it is easy to fall into the habit of assuming that the task of the state judge, too, is to obey; the elaboration of federal constitutional law is a hierarchical task, in which commands come from the federal bench and, eventually, from the United States Supreme Court.

But there is a different, richer, and more coherent account of lawmaking which asserts that it is a cooperative enterprise in which each participant, including the citizen, shares in the privilege and duty of principled elaboration. And this competing account is not inapplicable to federal constitutional law. In respect to federal constitutional principles, too, there is a moral and legal community which is mutually and reciprocally charged with the mutual and reciprocal elaboration of these principles. We are not

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especially favored by enthusiastic partisans of an interventionist federal judiciary.

entitled to deny to state court judges the competence to participate in this process; to do so would deny them *pro tanto* membership in this cooperative moral and legal community.[66]

VII.

It is time to conclude this talk. Nothing I have said should be taken to disparage the historic contribution which the federal courts have made to the task of transforming constitutional ideals into reality. I am not—to put it in more pedestrian terms—arguing in any way against the original federal question jurisdiction. Indeed, most of what I have said is simply irrelevant to the role of the federal courts which is perhaps most important and certainly most controversial today: their use to remedy alleged unconstitutional practices on a broad systemic level. I have not focused on the federal suit to desegregate the schools or to reapportion the state legislature or to reform jails, hospitals, and police departments.

Further, I am aware that there may be periods when a highly interventionist position is necessary and justified. Allocations of power between the federal and state courts have always been sensitive to particular historical circumstances. When mistrust of the state courts is justified and endemic, federal supervision must be strengthened.[67] All I ask is that we remember that mistrust is not necessarily the correct permanent attitude.

Finally, it should be clear that I intend to cast no doubt on the need for federal *appellate* review of state court judgments on questions of federal law. Provision must be made for uniform and authoritative pronouncements of federal law. Serious questions can, of course, be raised about whether the appellate jurisdiction of the

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[66] I am indebted to my colleague Professor Charles Fried for calling my attention to the relevance of the considerations addressed in the last two paragraphs. The most elegant exposition of the alternative account of lawmaking to which I refer continues to be Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart,* 71 HARV. L. REV. 630 (1958).

[67] In addition, more intensive federal court supervision, particularly of the sort permitted on habeas corpus, may be particularly appropriate during periods when the relevant rules of federal constitutional law are themselves undergoing rapid change and development. When these rules are stable and clearly defined, their application may be left to the state courts with reasonable confidence that the Supreme Court's appellate jurisdiction will provide sufficient oversight.

United States Supreme Court constitutes sufficient appellate capacity to perform this function;[68] and I myself have been sympathetic to proposals that a new national court of appeals, with jurisdiction to review decisions of state courts on issues of federal law, be created.[69] But that is a question for another day.

My purpose today has been a narrower one: to demonstrate that the state courts will and should continue to play a substantial role in the elaboration of federal constitutional principles. The continuation of this role is particularly important in the many situations when the state court is part of the enforcement system, and the federal question is relevant to whether the state court should participate in or authorize enforcement. It is in this context that federal intervention is most dubious and should, I submit, be justified by institutional principles transcending generalized claims of superior federal-court competence and sensitivity. Beyond this, the state courts are and should be seen as a valuable and enriching resource when they participate in the great task of federal constitutional lawmaking.

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[68] See, e.g., Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043 (1977).

I appreciate that there is an analytical uneasiness about a position which draws a sharp distinction between federal appellate review, on the one hand, and collateral relitigation of federal questions already considered in the state courts, on the other. Thus it is a fair question to ask: why can't federal habeas corpus simply be characterized as an alternate form of federal appellate review, justified precisely because direct Supreme Court review of state court judgments does not provide sufficient appellate capacity?

The difficulty, it seems to me, is that providing an opportunity for collateral attack along the lines of *Brown v. Allen* is not a good way of achieving the purposes of appellate review; there is a mismatch between the habeas corpus regime, on the one hand, and the ends to be achieved by providing federal appellate review of state court judgments, on the other. *First*, it is a major function of appellate review to permit higher authority to correct error. But what is troublesome about habeas corpus is, precisely, the characterization of the federal district court as constituting higher authority than the state supreme court; that problem is not solved by calling it appellate review. *Second*, another major function of appellate review is to provide a method for unifying the conflicting views of lower courts—for stabilizing the law and creating equality in the administration of justice. But federal habeas corpus does not rationally serve these ends. There is no reason to think that the federal district courts will achieve more uniform results with respect to questions of federal constitutional law than the supreme courts of the fifty states. Review by the courts of appeals does, of course, create some centripetal force. But it is notorious that, with twelve circuits and increasing numbers of judges on them, the prospects of inter- and intracircuit conflicts are substantial and increasing. *Third*—and both of the previous points are relevant here—allowing collateral attack not only does not alleviate—in a way it exacerbates—the problem of a logjam at the Supreme Court level. This is because it allows state court litigants a second shot at seeking Supreme Court review; a federal question in a state criminal case now routinely generates two petitions for certiorari rather than one—one from the state supreme court and a second from the habeas case. *Finally*, if what we are interested in is increased appellate capacity, it seems to me doubtful that we would be so free in allowing trial de novo of the facts (as permitted by Townsend v. Sain, 372 U.S. 293 (1963)).

Obviously the point is not that there is a sharp logical distinction between federal appellate review and federal collateral relitigation. Nor am I asserting that it is inconceivable for the federal district courts to play a role in the appellate supervision of state courts adjudicating federal questions. My submission is that the current call for additional appellate capacity derives from the judgment that the Supreme Court cannot, all by itself, satisfy the nation's need for uniform, authoritative, nationwide, federal lawmaking. And that need cannot be satisfied by providing for collateral attack in the district courts on state court judgments.

[69] See HART & WECHSLER 1981 SUPP. 2-6 for a review of recent proposals to expand the federal appellate capacity.

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